PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

06-612 SEP 29 2006

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No. 06-

IN THE

Supreme Court of the United States

KEITH B. BARANSKI,

Petitioner,

v.

FIFTEEN UNKNOWN AGENTS OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a search warrant which, with respect to the things to be seized, stated "See Attached Affidavit," violated the Particularity Clause of the Fourth Amendment where the affidavit was not attached to, and did not otherwise accompany, the warrant and was not at the scene of the search.

2) Whether Respondents had qualified immunity if the search warrant violated the Particularity Clause of the Fourth Amendment?

PARTIES TO THE PROCEEDING

The parties are Keith B. Baranski, Pars International Corporation, and fifteen unknown agents of the Bureau of Alcohol, Tobacco, Firearms & Explosives, Brian Dixon, Michael R. Johnson, Douglas R. Dawson, Mark S. James, Karl L. Stankovic, and William J. Hoover.

This petition is filed only by Keith B. Baranski.

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The Opinion of the United States Court of Appeals for the Sixth Circuit (*En Banc*) affirming the judgment dismissing Petitioner's civil action is published at 452 F.3d 433 (6th Cir. 2006) and is printed in the Appendix ("App.") at App. 1a. The panel Opinion of the United States Court of Appeals for the Sixth Circuit reversing the judgment dismissing Petitioner's civil action is published at 401 F.3d 419 (6th Cir. 2005).

JURISDICTION

A panel of the United States Court of Appeals for the Sixth Circuit reversed the judgment dismissing Petitioner's civil action on March 14, 2005. A timely filed Petition for Rehearing *En Banc* was granted on August 5, 2005, vacating the panel decision. On July 3, 2006, the United States Court of Appeals for the Sixth Circuit (*En Banc*) affirmed the judgment dismissing Petitioner's civil action. This Court has jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISION

> [N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and *the* persons or *things to be seized*.

U.S. Const., Amendment IV (emphasis added).

STATEMENT OF THE CASE

On April 10, 2001, a warrant was issued by Magistrate Judge Gambill of the United States District Court for the Western District of Kentucky for a search of Pars International Corporation ("Pars"), a bonded customs warehouse ("CBW")

in Louisville, Kentucky based on an affidavit of Bureau of Alcohol, Tobacco & Firearms ("ATF") Special Agent Michael Johnson. The affidavit was sealed by order of the district court upon motion of the United States. With respect to the things to be seized, the warrant stated: "See Attached Affidavit." On April 11, 2001, ATF agents seized 372 machineguns and 12 crates of accessories,[1] all of which had been imported into the CBW by Baranski pursuant to permits issued by the ATF. The owner of the warehouse warned the agents prior to entering the CBW that, because the warrant failed to describe the items to be seized with particularity, it was defective and hence, invalid.

On July 5, 2001, Baranski and Pars filed a multi-count civil action against fifteen (15) unknown, and six (6) named, ATF agents (hereinafter "the agents") and the United States in the United States District Court for the Western District of Kentucky. Count 3(a) sought damages against the agents, pursuant to *Bivens* v. *Six Unknown Agents*, 403 U.S. 388 (1971), for violation of the Fourth Amendment.[2] The agents

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[1] The 12 crates of accessories were not mentioned in the affidavit.

[2] The remaining counts are not at issue here. Count 1 was a claim against the United States seeking an order directing the United States to unseal the affidavit for the warrant. Count 2 was also a claim against the United States, requesting that the property be suppressed as evidence and returned. Count 3(b) sought damages against the agents pursuant to *Bivens* for violation of the Fifth Amendment. Count 3(c) sought damages against the agents under state law for trespass upon property and chattels. Counts 3(d) and (e) sought damages against the agents under state law for tortious interference with prospective business relationships. Count 3(f) sought damages against the agents under state law for defamation.

and the United States filed timely motions to dismiss.[3]

By Memorandum Opinion and Order entered March 22, 2002, the district court stayed decision on Count 3(a) as the Government had notified the court of an ongoing criminal investigation.[4] The stay remained in place until November 21, 2002.

On July 3, 2002, Baranski was indicted in the Eastern District of Missouri, charging him and unindicted (in the same criminal case) co-conspirators James Carmi and Jeffrey Knipp with conspiracy, pursuant to 18 U.S.C. § 371:

> to obtain the right to import machineguns into the United States and to receive and possess machineguns which had been imported into the United States, by means of making and submitting false entries on applications, and

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[3] The facts set forth in the Complaint must be accepted as true for purposes of a motion to dismiss. *Albright* v. *Oliver*, 510 U.S. 266, 268 (1994)(on motion to dismiss complaint pursuant to Fed.R.Civ.Pro. 12(b)(6), court must "accept the well-pleaded allegations of the complaint as true").

[4] The district court denied the motion to dismiss Count 1as it had jurisdiction to hear a motion under Rule 41(e). On Count 2, the district court granted the motion to dismiss because forfeiture proceedings had been initiated. On Count 3(b), the district court stayed decision as the Government had notified the court of an ongoing criminal investigation. On Counts 3(c)-(f), the district court granted the motion of the United States to be substituted for the individual defendants and dismissed those claims against the agents, and also dismissed the claims against the United States as the substituted defendant (because Baranski and Pars had not exhausted administrative remedies).

> other records required by Title 26, Chapter 53 to import machineguns into the United States, knowing such entries to be false . . . .

The indictment also sought criminal forfeiture of the 372 machineguns and the 12 crates of accessories.

Baranski filed a motion to suppress evidence in the criminal case on the ground that, because the warrant did not did not state the things to be seized,[5] it violated the particularity requirement of the Fourth Amendment.[6] The district court denied the motion, holding that, although the warrant violated the particularity requirement of the Fourth Amendment, the good faith exception of *United States* v. *Leon*, 468 U.S. 897 (1984) applied. Baranski was found guilty by a jury on November 18, 2002.

By Order of November 21, 2002, the district court in the instant case removed the stay, ordered the affidavit unsealed, and granted the United States time to file a motion for dismissal based upon qualified immunity.

On February 20, 2003, Baranski was sentenced in the criminal proceeding to 60 months, 3 years supervised release, and a $100 special assessment. The district court also entered a judgment of forfeiture as to the 372 machineguns and 12 crates of accessories. A timely notice of appeal to the United

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[5] The Government conceded that the warrant lacked particularity as to the items to be seized.

[6] ". . . no Warrants shall issue, but upon probable cause . . . particularly describing the . . . things to be seized."

States Court of Appeals for the Eighth Circuit was filed on February 26, 2003.

By Memorandum Opinion and Order dated March 14, 2003, the district court in the instant case dismissed Counts 3(a) and (b). With respect to Count 3(a), the district court held that "no Fourth Amendment violation occurred." Further, the district court held that Baranski and Pars did not show a violation of a "clea y established" right because the "Sixth Circuit case law is certainly far from clear that an officer should not execute a warrant where the affidavit supporting it has been sealed." The district court also found that a "reasonably prudent federal official" could not have believed that "he had violated a constitutional right."[7] The district court also noted that the district court in the criminal proceeding against Baranski had held that "the good faith exception [to the exclusionary rule] applied, that is that the ATF agents had good reason to believe that the warrant was valid." The district court thus determined that, "[t]o find that Plaintiffs had grounds to pursue their *Bivens* actions, this Court would need to completely ignore the Magistrate Judge's findings." Thus, the district court, relying on *Heck* v. *Humphrey*, 512 U.S. 477 (1994), concluded that dismissal of the Baranski's Fourth Amendment claim was required.

On May 3, 2003, a timely notice of appeal in the case

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[7] As to Count 3(b), the district court held that there was no Fifth Amendment violation because the Fifth Amendment's due process clause does not require notice or hearing "prior to a seizure of possessions under a criminal search warrant." Baranski had not joined in making that argument.

bar was filed.

On September 23, 2003, the United States Court of Appeals for the Eighth Circuit affirmed Baranski's conviction; a timely Petition for Rehearing *En Banc* was denied on October 30, 2003. This Court denied a petition for a writ of certiorari on April 26, 2004.

On March 14, 2005, a panel of the Court of Appeals in the instant case, relying on *Groh* v. *Ramirez*, 540 U.S. 551 (2004), reversed the judgment of the district court, holding that: i) the warrant was invalid as to the Fourth Amendment's particularity requirement and that the agents did not have qualified immunity, and ii) although Baranski could not seek the replacement value of the weapons or lost profits due to his dispossession of the weapons, he could seek damages for impaired reputation and mental anguish as well as punitive damages attributable to the means by which the agents effected the search and seizure. 401 F.3d 419 (6th Cir. 2005).[8]

The agents timely petitioned for rehearing *en banc* "solely with respect to the majority's determination that the agents were not entitled to qualified immunity." The petition was granted on August 5, 2005, vacating the panel decision.

In an opinion of July 3, 2006, the Sixth Circuit *en banc* affirmed the district court's dismissal of Count 3(a). 452 F.3d

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[8] Judge Cook concurred in the panel's holding that the warrant was invalid as to the Fourth Amendment's particularity requirement, but dissented from the panel's holding that the agents did not have qualified immunity. 401 F.3d at 438.

433 (6th Cir. 2006) Seven judges held that there was no Fourth Amendment violation and that the agents had qualified immunity. Two judges, in a concurring opinion, found that there was a Fourth Amendment violation, but that the agents had qualified immunity. Four dissenting judges found that there was a Fourth Amendment violation and that the agents did not have qualified immunity.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS ON THE APPLICATION OF THE PARTICULARITY CLAUSE OF THE FOURTH AMENDMENT CONFLICTS WITH THIS COURT'S DECISION IN *GROH* V. *RAMIREZ*

1) *Groh* v. *Ramirez*, 540 U.S. 551 (2004) held that a warrant which, in the portion of the form that called for a description of the "person or property" to be seized, described the two-story blue house to be searched, violated the Fourth Amendment's Particularity Clause and that the affiant did not have qualified immunity.

The decision of the Court of Appeals here conflicts with the decision in *Groh* in that the Court of Appeals concluded that, where a warrant incorporates an affidavit by reference in the place on the warrant which describes the things to be seized, the affidavit need not accompany the warrant when the warrant is executed.

2) In *Groh*, as in the instant case, the application for the warrant was supported "with a detailed affidavit" that "set forth the basis for [the affiant's] belief that the listed items were concealed on the ranch." 540 U.S. at 554. The warrant, however, "failed to identify any of the items that petitioner

intended to seize." *Id.* The warrant also "did not incorporate by reference the itemized list contained in the application." *Id.* And, as in the case at bar, the "affidavit was sealed." *Id.*, n.3.[9]

In holding that the warrant "was plainly invalid," 540 U.S. at 557, *Groh* first stated:

> The Fourth Amendment states unambiguously that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and *the persons or things to be seized.*" (Emphasis added [by Court]).

Id.

With regard to the particularity requirement, *Groh* concluded, "the warrant failed altogether." *Id.*[10] Responding to the contention that a sufficiently particular *application* could save the warrant, this Court held:

> The fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the

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[9] Groh noted that the "sufficiency [of the affidavit] is not disputed." *Id.*, n.3. In the case at bar, the affidavit's sufficiency *was* disputed in the criminal case in both the district court and the court of appeals, although that issue is not raised here.

[10] Justice Kennedy and Chief Justice Rehnquist agreed with the Court that "the Fourth Amendment "was violated in this case." 540 U.S. at 566.

supporting documents.

Id.

While *Groh* clarified that the Fourth Amendment does not "forbid[] a warrant from cross-referencing other documents," *id.*, this Court emphasized that the warrant must use "appropriate words of incorporation" *and* the supporting document must "accompan[y] the warrant." 540 U.S. at 558. *Groh* did not, however, analyze what it meant by "accompany" as it was not necessary to the decision of the case because the issue was whether the warrant was facially invalid.[11]

While *Groh* did not analyze what it meant by "accompany," it cited (apparently with approval) cases from six (6) courts of appeals.

In *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997), "the warrant referred the reader to the 'attached affidavit which is incorporated herein.'" 122 F.3d at 848. There was, however, "no evidence that the affidavit or any copies were ever *attached to the warrant* or were *present at the time of the search* . . . ." 122 F.3d at 849 (emphasis added). Thus, the court concluded that the warrant was invalid. 122 F.3d at 850. The Ninth Circuit noted that, "[i]f the government wishes to keep an affidavit under seal, it must list the items it seeks with particularity in the warrant itself." 122 F.3d at 850.

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[11] Unlike the instant case, in *Groh*, in the portion of the form that called for a description of the "person or property" to be seized, the affiant had typed a description of the two-story blue house to be searched; no mention was made of the affidavit.

In *United States v. Williamson*, 1 F.3d 1134 (10th Cir. 1993), at the footnote cited by *Groh*, the court stated:

> We do not consider the contents of the warrant application or its accompanying affidavit because such documents can cure a defective warrant only when *both* of two requirements are met: "'first, *the affidavit and search warrant must be physically connected* so that they constitute one document; and second, the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference.'" *Leary*, 846 F.2d at 603 (quoting 2 Wayne R. LaFave, Search and Seizure § 4.6(a), at 241 (2d ed. 1987)). We find no evidence in the record that either the affidavit or the warrant application were attached to the search warrant at the time of execution.

1 F.3d at 1136, n. 1 (emphasis added).

In *United States* v. *Blakeney*, 942 F.2d 1001, 1023 (6th Cir. 1991), the affidavit was "attached to the search warrant . . . ."

In *United States v. Maxwell*, 920 F.2d 1028, 1032 (D.C. Cir. 1990), the court stated that the warrant must "not only attach the affidavit, but must also contain 'suitable words of reference' . . . ."

In *United States* v. *Curry*, 911 F.2d 72, 76-77 (8th Cir. 1991), the "Application for Search Warrant and Supporting Affidavit" was "attached to the warrant . . . ." 911 F.2d at 78.

In *United States v. Roche*, 614 F. 2d 6, 8 (1st Cir. 1980), the court held that the affidavit must be "incorporated into the warrant and *served with the warrant* . . . ." (emphasis added).

Thus, the cases tacitly approved by *Groh* required that the referenced documents must be attached to the warrant or at least be present at the search.[12] In the case at bar, the affidavit was sealed and not attached to the warrant. Indeed, because the affidavit was sealed, it could not have been in the officer's vehicle nor present at the search nor otherwise readily available to the officers. Thus, even if "accompany" included being readily available to the searching officers, the affidavit here did not "accompany" the warrant.

3) *Groh* found that the warrant was "so obviously deficient that we must regard the search as 'warrantless' within the meaning of our case law." *Id.* This Court reiterated that the "presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of

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[12] The Court of Appeals in the instant case noted that all of the courts of appeals (save the Federal Circuit) have permitted warrants to cross-reference supporting affidavits and to satisfy the particularity requirement through an incorporated and attached document, citing *United States* v. *Riccardi*, 405 F.3d 852, 863 n.1 (10th Cir. 2005); *United States* v. *Miggins*, 302 F.3d 384, 395 (6th Cir. 2002); *United States* v. *Beaumont*, 972 F.2d 553, 561 (5th Cir. 1992); *United States* v. *Jones*, 54 F.3d 1285, 1290 (7th Cir. 1995); *United States* v. *Bianco*, 998 F.2d 1112, 1116-17 (2d Cir. 1993); *United States* v. *Towne*, 997 F.2d 537, 544 (9th Cir. 1993); *United States* v. *Washington*, 852 F.2d 803, 805 (4th Cir. 1988); *United States* v. *Vaughn*, 830 F.2d 1185, 1186 (D.C. Cir. 1987); *United States* v. *Johnson*, 690 F.2d 60, 64 (3d Cir. 1982); *United States* v. *Wuagneux*, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982); *United States* v. *Klein*, 565 F.2d 183, 186 n.3 (1st Cir. 1977); *United States* v. *Johnson*, 541 F.2d 1311, 1315 (8th Cir. 1976).

particularity in the warrant." 540 U.S. at 559.

4) *Groh* also squarely rejected the contention that a search pursuant to a warrant lacking particularity may not be unreasonable where the "scope of the search did not exceed the limits set forth in the application." 540 U.S. at 560. In rejecting this contention, this Court focused on the fact that, if the things to be seized are not described in the warrant, but in the affidavit, the affidavit must be "incorporated by reference" *and* be "present at the search . . . ." *Id.*

The first part of *Groh* concluded by stating:

> It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted. [footnote omitted]. Because petitioner did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly "unreasonable" under the Fourth Amendment.

540 U.S. at 563.

5) Because *Groh* did not expressly decide whether an affidavit must accompany a warrant if the warrant incorporates the affidavit, but only tacitly approved such a requirement, the Court of Appeals concluded that the Particularity Clause does not require, where a warrant incorporates an affidavit by reference, that the affidavit accompany the warrant when the search is executed.

In concluding that the warrant at issue here complied

with the Particularity Clause, the Court of Appeals stated that Baranski had not "shown that the agents failed to comply with the last requirement of the Warrant Clause—that the search warrant approved by the magistrate 'particularly describ[e] . . . the persons or things to be seized.' U.S. Const. amend IV." 452 F.3d at 439. The basis for this statement is that the agents:

> presented two documents to the magistrate: a one-page "Search Warrant" and a ten-page "Application and Affidavit for Search Warrant." JA 115, 116. The one-page "Search Warrant" was a form document filled out by agent Johnson that contained blank spaces for the magistrate (1) to approve and sign the warrant, (2) to state the date and time when the magistrate approved the warrant and (3) to limit the time within which the agents had authority to execute the warrant. JA 115. At the location on the form for identifying the items to be seized, agent Johnson referred to an attached affidavit ("See Attached Affidavit"), which identified the items that the agents sought permission to seize. *Id.*

Id.

Further, the affidavit "specifically described the items that the agents sought to find and seize" and "agent Johnson presented both the warrant and the affidavit to the magistrate, as he independently signed each of them." *Id.*

The flaw in the Court of Appeals' reasoning (which

allowed it to conclude that the warrant here complied with the Particularity Clause) is that the magistrate's signing of a warrant, when both the warrant and an affidavit describing the things to be seized have been presented to him, is not tantamount to the *warrant* "particularly describing" the things to be seized.[13] While acknowledging that *Groh* expressly held that "the fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity" because the "Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents," 452 F.3d at 439 (quoting *Groh*, at 557) and noting that *Groh* observed that "'most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant' (*Groh* at 557-58)," 452 F.3d at 439, the Court of Appeals distinguished *Groh* by noting that, in *Groh*, the warrant did not "cross-reference the affidavit at all." *Id.* Thus, according to the Court of Appeals, *Groh*'s observation concerning the supporting document accompanying the warrant is *dictum* and the Particularity Clause does not require that, where a warrant cross-references the affidavit, that the affidavit accompany the warrant.

6) To reach its conclusion that *Groh*'s apparent adoption of the holdings of the six courts of appeals cited above

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[13] The Court of Appeals' decision tracks the dissent in *Groh*, which concluded that "the items to be seized were clearly specified in the warrant application and set forth in the affidavit, both of which were given to the Judge (Magistrate). The Magistrate reviewed all of the documents and signed the warrant application and made no adjustment or correction to this application." 540 U.S. at 576.

was *dictum* which it was not bound to follow, the Court of Appeals noted that the problem with the warrant in *Groh*, *i.e.*, that it was invalid on its face because, in the space for a description of the property to be seized, it described the place to be searched and it did not incorporate an affidavit, did not occur in the case at bar. 452 F.3d at 440. To be sure, the specific problem in *Groh* was not present in the case at bar and *Groh*'s apparent adoption of the holdings of the six courts of appeals cited above was not necessary to the holding of the case. But the Court of Appeals' decision misapplied the reasoning of *Groh*.

First, the Court of Appeals observes that the fact that the magistrate was presented with warrant and the affidavit, and the affidavit described the property to be seized with particularity, was adequate under the Particularity Clause because "this *warrant* made it clear that the magistrate understood and cabined the scope of the search he was authorizing." 452 F.3d at 440 (emphasis added). This view is, however, directly contradicted by *Groh*: "The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." 540 U.S. at 557. Thus, *Groh* has drawn a clear distinction between the "warrant" and "supporting documents." The Court of Appeals' statement ignores that distinction.

Further, in justifying its conclusion, the Court of Appeals misquotes *Groh*. In *Groh*, this Court stated:

> *[U]nless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the*

> *affidavit present at the search)*, there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit.

540 U.S. at 560.

The Court of Appeals' justification for its conclusion stated:

> [R]ather than leaving reviewing courts in doubt whether the magistrate provided "written assurance that [he] actually found probable cause to search for, and to seize, every item mentioned in the affidavit," *[Groh]* at 560, this warrant and affidavit (and the magistrate's signature on both of them) made it clear that the magistrate found that there was probable cause to support the search.

452 F.3d at 440.

Thus, *Groh* made clear that "written assurance" that the magistrate found probable cause arose not from the magistrate's signature on the warrant and affidavit, but by description of "the particular items" either "in the warrant itself" "or "incorporated by reference, and the affidavit present at the search . . . ." *Groh*, 540 U.S. at 560.

The Court of Appeals based its holding on its analysis of the Fourth Amendment's textual requirements, *i.e.*, that the Fourth Amendment "places restrictions on the *issuance* of a

warrant." 452 F.3d at 440. One of the restrictions on the *issuance* of a warrant is that the warrant "particularly describe" the persons or things to be seized. According to the Court of Appeals:

> [E]ach of these requirements must be satisfied upon the "issu[ance]" of the warrant, and nothing about the text of the clause suggests that a warrant valid upon issuance may become invalid upon execution when the scope and timing of the search is conducted in accordance with the terms of the warrant.

452 F.3d at 441.

The Court of Appeals thus implicitly concluded that the warrant in the instant case was valid upon issuance. This conclusion is erroneous as it derives from the Court of Appeals' statement that "the affidavit specifically described the items that the agents sought to find and seize" and the agent "presented both the warrant and the affidavit to the magistrate, as he independently signed each of them." 452 F.3d at 439.[14]

The flaw in the conclusion of the Court of Appeals is that the warrant was not valid upon issuance merely because the agent presented both the warrant and the affidavit to the magistrate. As noted in *Groh*, "[t]he Fourth Amendment by its terms requires particularity *in the warrant*, not in the supporting documents." *Groh*, 540 U.S. at 557 (emphasis added).

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[14] No where in the opinion does the Court of Appeals find that, when the magistrate completed the warrant, he attached the affidavit to it.

Moreover, as *Groh* further recognized, "a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Id.* at 557-58. Thus, the warrant here was not valid upon issuance because the *warrant* did not particularly describe the things to be seized nor did the affidavit accompany the warrant after it was signed by the magistrate.[15]

The Court of Appeals further justifies its conclusion by purportedly looking to the historical purposes of the Particularity Clause. 452 F.3d at 441. While acknowledging that the Particularity Clause "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search," *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977) (citing *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U.S. 523, 532 (1967)), *abrogated on other grounds*, *California* v. *Acevedo*, 500 U.S. 565 (1991), 452 F.3d at 441, the Court of Appeals states that, "[w]hen the magistrate approved this warrant," it "contained these assurances, as it restricted the items to be seized to weapons owned by

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[15] In his treatise on search and seizure, LaFave concludes:

> [I]t is clear that the Court in *Groh* has accepted and adopted the incorporation/accompanying approach, without specifically saying so. . . . the court hangs this conclusion not on the particularity-of-description function of advising the executing officers what to search for and seize, but rather on the function of notice to the person who premises are being searched.

Wayne R. LaFave, *Search and Seizure* § 4.6(a), at 616 (4th ed. 2004).

Baranski." 452 F.3d at 441. *Groh*, however, emphasized that the "presence of a search warrant serves a high function," *McDonald* v. *United States*, 335 U.S. 451, 455 (1948), and that high function:

> is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection.

Groh, 540 U.S. at 557.

Accordingly, the fact that the documents presented to the magistrate contained assurances when the magistrate approved the warrant is not what *Groh* recognized as fulfilling the purpose of the Particularity Clause.

7) The Court of Appeals states that Baranski and Pars challenge the search as warrantless for three reasons:

> [T]he agents did not hand Pars' attorney a copy of the affidavit when he asked for it at the outset of the search; the agents did not bring the affidavit with them when they conducted the search; and the agents did not leave a copy of the affidavit with the warrant after the search.

452 F.3d at 442.

Baranski does not challenge the search as warrantless

either because the agents did not hand Pars' attorney a copy of the affidavit when he asked for it at the outset of the search or because the agents did not leave a copy of the affidavit with the warrant after the search; Baranski's sole objection to the warrant is that the affidavit did not accompany the warrant.

With regard to that issue, the Court of Appeals recognizes that "*Groh* contains some language in support of plaintiffs' second argument—that an incorporated affidavit must accompany the warrant at the time of the search. See 540 U.S. at 558." 452 F.3d at 443. The Court of Appeals, however, dismisses that support by stating that, "[r]ead in context," these passages "do not establish the bright-line rule that Baranski and Pars advocate" because *Groh* turned on the facial invalidity of the warrant, not the manner in which the officers conducted the search. *Id.* While *Groh* indeed turned on the facial validity of the warrant, that fact does not detract from *Groh*'s recognition of the accompaniment requirement.

The Court of Appeals first asserts as a "possibility" for *Groh*'s recognition of the accompaniment requirement that such statements were "necessary to resolve the facial-invalidity problem" in that the reference to the absence of any attached affidavit "ensured that the Court" was not "directly resolving" the issue of whether *Groh* might have been differently decided "if the facially defective warrant had been attached to an affidavit signed by the magistrate that clearly corrected the omission and that accompanied the warrant during the search." 452 F.3d at 444. There is nothing in *Groh* suggesting that such was this Court's purpose. On the contrary, *Groh* made the statements to clarify its holding that "[t]he fact that the application adequately described the 'things to be seized' does

not save the warrant from its facial invalidity." 540 U.S. at 557.

The second "possibility" asserted by the Court of Appeals is that this Court was:

> was suggesting that officers generally should bring an incorporated affidavit (or an authenticated summary of the items to be seized) with them during the search and that the failure to do so may be a factor in determining whether the search was reasonable . . . .

452 F.3d at 444.

This is belied by the fact that the dissent in *Groh* made such an argument: "the search was not unreasonable" because:

> Prior to execution of the warrant, petitioner briefed the search team and provided a copy of the search warrant application, the supporting affidavit, and the warrant for the officers to review. Petitioner orally reviewed the terms of the warrant with the officers, including the specific items for which the officers were authorized to search.

540 U.S. at 576.

There is nothing in the majority opinion in *Groh* which suggests that this Court found this argument applicable or persuasive.

In sum, the Court of Appeals decision is in conflict with *Groh* and this Court should grant this petition to determine expressly the important federal question of whether, under the Particularity Clause, a court "may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant . . . " *Groh* at 557-58.

II.
THE DECISION OF THE COURT OF APPEALS WITH RESPECT TO QUALIFIED IMMUNITY CONFLICTS WITH THIS COURT'S DECISION IN *GROH* V. *RAMIREZ*

1) *Groh* held that the agents did not have qualified immunity because "the particularity requirement is set forth in the text of the Constitution, [and] no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid." 540 U.S. at 563. Moreover, because the Particularity Clause was involved, *Groh* observed that *United States* v. *Leon*, 468 U.S. 897 (1984) had held that "a warrant may be so facially deficient--i.e., in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid." *Groh*, 540 U.S. at 565 (citing *Leon*, 468 U.S. at 923. *Groh* also noted that "even a cursory reading of the warrant in this case – perhaps just a simple glance -- would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." 540 U.S. at 564.

The warrant here was as glaringly deficient as the warrant in *Groh* because the basis for *Groh*'s holding that the

warrant was glaringly deficient was not that the *wrong* information *was* in the portion of the warrant form that called for a description of the "person or property" to be seized, but that the *correct* information *was not* there:

> [T]he warrant did not describe the items to be seized at all. In this respect the warrant was so obviously deficient that we must regard the search as "warrantless" within the meaning of our case law.

540 U.S. at 558.

Thus, whether the portion of the warrant form that called for a description of the "person or property" to be seized was blank or contained erroneous information or incorporated another document (where the other document was not present) is of no moment; the warrant "does not describe the items to be seized at all" and is "so obviously deficient" that the search must be regarded as "warrantless." Indeed, the deficiency in the instant case was so apparent that even the owner of the warehouse saw it and warned the agents that, because the warrant failed to describe the items to be seized with particularity, it was defective.

2) Despite the analytic framework set forth in *Groh*, the Court of Appeals analyzed the agents' qualified immunity based upon "prevailing law" in the Sixth Circuit. 452 F.3d at 449. No where in *Groh* did this Court suggest, however, that, for purposes of the Particularity Clause, such an analysis was applicable. Indeed, even the dissenting opinions in *Groh* did not look to the law of the circuit in which the case arose, but rather

to this Court's decisions to determine the prevailing law.

3) The Court of Appeals also noted that the Fourth Amendment law was "hazy" because the Eighth Circuit, in Baranski's criminal appeal, had concluded that the evidence seized pursuant to the warrant should not have been suppressed for lack of particularity in the warrant. 452 F.3d at 448. The Eighth Circuit, however, decided Baranski's criminal appeal before *Groh* held that the law regarding warrant particularity was "clearly established" because "the particularity requirement is set forth in the text of the Constitution . . . ." 540 U.S. at 563.

4) The Court of Appeals did not accurately portray existing Sixth Circuit case law. The "practice of incorporation" was first recognized in *United States* v. *Gahagan*, 865 F.2d 1492 (6th Cir. 1989), which held that, while the "warrant itself did not contain a sufficient description of Cabin #3," the "description contained in the affidavit sufficiently described the place to be searched and that description included Cabin #3." 865 F.2d at 1497. Moreover, the affidavit could "be relied upon . . . to cure the defect in the warrant." *Id.* Thus, a warrant:

> that fails to describe the area to be searched with sufficient particularity can be cured by an accompanying affidavit *if the affidavit is attached to the warrant* and the warrant incorporates the affidavit by reference.

865 F.2d at 1497 (emphasis added).

Gahagan concluded that the affidavit could be relied upon because, although it was "not attached to the warrant," it was "in [the officer's] vehicle and readily accessible to the officers." *Id.*

Gahagan was followed by *United States* v. *Blakeney*, 942 F.2d 1001 (1991),[16] where the issue was whether "the affidavit *attached to the search warrant* failed to establish probable cause . . . ." 942 F.2d at 1023 (emphasis added). In discussing the issue, the court first observed that a "search warrant may be construed with reference to a supporting affidavit *if the affidavit accompanies the warrant and the warrant incorporates the affidavit by reference*." *Id.* at 1024 (emphasis added). Accordingly, the agents here should have known from *Blakeney* that the "practice of incorporation" required that an affidavit be attached to, or at least accompany, the search warrant, as well as be incorporated by reference.

In *Frisby* v. *United States*, 79 F.3d 29 (1996), Frisby argued that "the search of his premises and the seizure of his property was unlawful because the IRS-CID agents failed to serve him with a copy of Attachment A to the warrant." 79 F.3d at 31. Frisby did not challenge, and the court did not consider or decide, whether Attachment A was attached so that the warrant met the particularity requirement. In view of the court's statement that there was no challenge to "the specificity

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[16] *Blakeney* was one of the cases cited by *Groh* as setting forth the law concerning cross-referencing supporting documents: a court may construe a warrant with reference to a supporting affidavit "if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." 540 U.S. at 557-58.

with which the . . . things to be seized are enumerated" and that there were "no facial deficiencies" (*id.*), there is no reason to believe that Attachment A was not attached and that the particularity requirement as applied in *Gahagan* and *Blakeney* (*i.e.*, a warrant which, on its face, fails to meet the particularity requirement can be cured if the affidavit is attached to the warrant and the warrant incorporates the affidavit by reference) was not complied with. Indeed, the court concluded that "the search and seizure took place pursuant to a valid warrant . . . ." 79 F.3d at 32. Thus, *Frisby* did not alter the holdings of *Gahagan* and *Blakeney* and could not have notified the agents that their conduct was lawful.

The final case was *United States* v. *Pritchett*, 40 Fed. Appx. 901 (6th Cir. 2002). Because *Pritchett* was decided more than a year after the search here, it plainly could not have been relied on by the agents.[17] See *Brosseau v. Haugen*, 543 U.S. 194, 200, n.4 (2004). The issue in *Pritchett*, moreover, differs from that here. In *Pritchett*, while it appears that the defendant argued that the warrant was invalid because the attachment particularly describing the things to be seized was not attached to the warrant, the court cited *Frisby* and held that Pritchett, like Frisby, "was not prejudiced in the instant case." Thus, it appears that the court viewed Pritchett's argument to be that the failure of the officers seizing property to give him a copy of the attachment required the exclusion of evidence seized, an

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[17] *Pritchett* is also governed by Circuit Rule 28(g), which "disfavors" citation of unpublished opinions unless the unpublished opinion "has precedential value" and "there is no published opinion that would serve as well." Because *Frisby* and *Gahagan* set forth the applicable law, *Pritchett* could not have been relied upon by the agents.

argument precluded by *Frisby*. *Pritchett* also upheld the search because the affiant "was in charge of executing the search," which "minimized any possibility of its going beyond the scope of the warrant," citing the statement from *Gahagan* that "courts have taken into account facts known by the executing officer but not specifically stated in the affidavit or warrant to validate a search." 865 F.2d at 1497. Because *Gahagan* did not hold that the agent's knowledge *alone* satisfies the particularity requirement, but was merely an *additional* basis for upholding the search, *Pritchett* cannot be characterized as holding that the agent's knowledge *alone* satisfies the particularity requirement.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

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September, 2006

APPENDIX

United States Court of Appeals
for the Sixth Circuit

KEITH B. BARANSKI, d/b/a MAGUA INDUSTRIES (03-5582), and PARS INTERNATIONAL CORPORATION (03-5614),

Plaintiffs-Appellants,

v.

FIFTEEN UNKNOWN AGENTS OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, BRIAN DIXON, MICHAEL R. JOHNSON, DOUGLAS R. DAWSON, MARK S. JAMES, KARL L. STANKOVIC AND WILLIAM J. HOOVER,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 01-00398 — John G. Heyburn II, Chief District Judge.

Argued: December 7, 2005.

Decided and Filed: July 3, 2006

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, SUTTON, COOK, McKEAGUE, GRIFFIN, and NEILSON, Circuit Judges.*

COUNSEL

ARGUED: Richard E. Gardiner, Fairfax, Virginia, Saeid Shafizadeh, Louisville, Kentucky, for Appellants. Howard S. Scher, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF**: Richard E. Gardiner, Fairfax, Virginia, Saeid Shafizadeh, Louisville, Kentucky, for Appellants. Howard S. Scher, Barbara L. Herwig, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

SUTTON, J., delivered the opinion of the court, in which BOGGS, C. J., BATCHELDER, GIBBONS, COOK, McKEAGUE, and GRIFFIN, JJ., joined and in which GILMAN, J., joined as to Part II.B. GILMAN, J., delivered a separate opinion concurring in the judgment, in which DAUGHTREY, J., joined. CLAY, J., delivered a separate dissenting opinion in which MARTIN, MOORE, and COLE, JJ., joined and in which GILMAN, J., joined as to Part II.A.

OPINION

SUTTON, Circuit Judge. The Fourth Amendment provides in part that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In this case, several agents of the United States Bureau of Alcohol, Tobacco and Firearms (BATF) obtained a search warrant that satisfied the particularity requirements of

the Fourth Amendment at the time the magistrate issued the warrant. But by the time the agents conducted the search, a supporting affidavit that was cross-referenced in the warrant and that particularly described the things to be seized had been placed under seal and thus was not present during the search.

In this money-damages action filed against the agents under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), Keith Baranski and Pars International Corporation contend that the agents' search of a warehouse owned by Pars and seizure of weapons owned by Baranski violated their Fourth Amendment rights. Because the warrant described the items to be seized when the magistrate "issue[d]" it, the warrant satisfied the particularity requirements of the Fourth Amendment. And because the agents conducted the search in a reasonable manner, they did not otherwise violate the Fourth Amendment. We therefore affirm the judgment of the district court in favor of the agents.

I.

In September 1999, Keith Baranski, a licensed firearms dealer, began importing machine guns from Eastern European countries. *United States* v. *Baranski*, 75 Fed. App'x 566, 567 (8th Cir. 2003). He imported the guns through a bonded customs warehouse owned by Pars and located in Louisville, Kentucky, where federal law required Baranski to keep the guns until he could sell them to eligible law enforcement departments.

Instead of selling the guns to eligible buyers, however, Baranski obtained forged letters of interest from a police chief located in Farber, Missouri, so that he could remove the weapons from the warehouse and could sell them illegally.

BATF agent Michael Johnson uncovered the scheme when he found documents in a Missouri gun dealer's shop that linked Baranski to the dealer and when he learned that one of Baranski's letters of interest was forged, *id.* at 567.

On April 10, 2001, Johnson applied for a search warrant from a magistrate judge in Louisville, Kentucky, to allow him to search for and seize "about 425" weapons still being held by Baranski at the Pars warehouse. JA 120. As part of the warrant application, Johnson prepared an affidavit explaining Baranski's scheme, detailing the probable cause for the search, identifying the bonded section of the warehouse as the place to be searched and identifying the machine guns as the items to be seized. In the location on the search warrant for describing the things to be seized, the warrant did not separately list those items but said "See Attached Affidavit," which described the things to be seized. JA 91.

That same day, the magistrate judge approved the warrant. In doing so, he separately signed both the search warrant and the attached affidavit, then sealed the affidavit to protect the BATF's confidential sources. D. Ct. Op. at 2.

On April 11, 2001, Johnson led approximately 20 BATF agents to the Pars warehouse to execute the warrant. Upon reaching the warehouse, the agents were met by Saeid Shafizadeh, an attorney for Pars, who asked to see the warrant. After reading the warrant, Shafizadeh asked to see the affidavit, at which point the officers told him that it was under seal. One agent then told Shafizadeh that they were looking for firearms owned by Baranski (or by his company, Magua Industries) located in the bonded section of the warehouse. Shafizadeh

complained that the search was illegal because the warrant itself failed to describe with particularity what the agents could seize, but nonetheless cooperated with the agents. At Shafizadeh's direction, several United States Customs agents, who had recently inventoried the warehouse, escorted the agents to the basement of the building where the bonded warehouse was located. Once in the bonded warehouse, the agents seized 372 machine guns and 12 crates of firearm accessories belonging to Baranski. *Id.* Upon leaving the warehouse, the agents left an inventory of the seized items, *id.*, and a copy of the search warrant with Shafizadeh, *id.*

On July 5, 2001, Baranski and Pars filed this money-damages action in the United States District Court for the Western District of Kentucky. As pertinent here, they (1) brought a *Bivens* claim against Johnson and several named and unnamed agents, contending that the agents had violated their Fourth Amendment rights and (2) separately moved to unseal the affidavit referenced in the search warrant. On March 22, 2002, the district court denied plaintiffs' motion to unseal the affidavit and stayed the *Bivens* action pending the completion of the criminal investigation of Baranski.

On July 3, 2002, a grand jury based in the Eastern District of Missouri indicted Baranski for making "a false entry on any application, return, or record required by [the firearm importation laws], knowing such entry to be false." 26 U.S.C. § 5861(l). The indictment also sought criminal forfeiture of the guns and accessories seized in the April 11 search. Baranski moved to suppress the machine guns and accessories on Fourth Amendment grounds. The district court denied the motion. *United States* v. *Baranski*, No. 4:02-CR-361, slip op. at *4-5

(E.D. Mo. Nov. 1, 2002). On November 18, 2002, a jury found Baranski guilty of violating § 5861(l), and the court sentenced him to 60 months in prison. *Baranski*, 75 Fed. App'x at 568. Three months later, on February 27, 2003, the district court required Baranski to forfeit the weapons and accessories.

The Eighth Circuit affirmed. As to the suppression ruling, the court concluded that probable cause supported the warrant and that "[t]he warrant should not have been suppressed for lack of particularity. Although the warrant did not set out the property to be seized, the warrant referred to a sealed affidavit that described the weapons." *Baranski*, 75 Fed. App'x at 568. Any error in denying the motion to suppress, the court added, was harmless in view of the other evidence admitted against Baranski. *Id.* The court also upheld Baranski's conviction and sentence as well as the forfeiture of his property. *Id.* at 569.

After Baranski's conviction, the United States District Court for the Western District of Kentucky lifted the stay on Baranski's *Bivens* claim and unsealed agent Johnson's affidavit. On March 14, 2003, the district court granted the agents' claim of qualified immunity, holding that the search did not violate the Fourth Amendment and, alternatively, that the search did not violate clearly established Fourth Amendment law. D. Ct. Op. at 5-6.

On March 14, 2005, a panel of this court reversed the district court's grant of qualified immunity. Relying on the Supreme Court's intervening decision *Groh* v. *Ramirez*, 540 U.S. 551 (2004), the panel concluded that the warrant was facially deficient because the affidavit referenced in the warrant

and describing the items to be seized was under seal and was not attached to the warrant when the search was conducted. *Baranski* v. *Fifteen Unknown Agents*, 401 F.3d 419, 429 (6th Cir. 2005). In the absence of the affidavit, the panel concluded that the search was a warrantless one, that no exigent circumstances justified a warrantless search and that the agents had violated the claimants' clearly established rights. *Id.* at 432-33. On August 5, 2005, the full court vacated the panel's decision and granted rehearing en banc.

II.

In *Bivens*, the Supreme Court held that individuals could "recover money damages for any injuries [they have] suffered as a result of [a federal agent's] violation of the [Constitution]." 403 U.S. at 397. As with § 1983 actions against state and local officials, the Court has held that a claimant seeking relief under *Bivens* must overcome the federal official's qualified immunity. *Saucier* v. *Katz*, 533 U.S. 194 (2001). To overcome that immunity, claimants must show (1) that the agents violated their constitutional rights and (2) that the constitutional right at issue is "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 202 (quotations omitted); *Flaskamp* v. *Dearborn Pub. Schs.*, 385 F.3d 935, 940-41 (6th Cir. 2004).

A.

The Fourth Amendment says:

> [1] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and [2] no Warrants shall issue, but

> upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The first clause of the Amendment, the Reasonableness Clause, provides an overriding check on criminal investigations by the government, prohibiting all "unreasonable searches and seizures." See *Soldal* v. *Cook County*, 506 U.S. 56, 63 (1992); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931). The second clause, the Warrant Clause, explains the process for obtaining a warrant to authorize a search. See *Maryland* v. *Garrison*, 480 U.S. 79, 84-85 (1987); *United States* v. *Leon*, 468 U.S. 897, 914 (1984). The two clauses do not stand alone. A search that satisfies the Warrant Clause will generally, but not invariably, satisfy the Reasonableness Clause. See *Richards* v. *Wisconsin*, 520 U.S. 385, 395 (1997) (noting that despite the issuance of a warrant, "the reasonableness of the officers' decision . . . must be evaluated as of the time [of the search]"). And a search of a residence or building without a warrant is "presumptively unreasonable," *Payton* v. *New York*, 445 U.S. 573, 586 (1980), but will not invariably violate the Reasonableness Clause. See *id.* at 587 ("exigent circumstances" or consent may excuse the necessity of a warrant); *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 665 (1989) ("[N]either a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."). This case raises several questions about the two clauses and their relationship to each other.

First: were the agents required to obtain a warrant

before conducting this search? The parties agree, as do we, that the Warrant Clause applies to this search and that neither the exigent-circumstances exception, consent nor any other exception to the clause excused the officers from having to obtain a warrant before conducting this search. See *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311 (1978) ("The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes.").

Second: when the magistrate approved this warrant, did it comply with the Warrant Clause even though the warrant itself did not describe with particularity the items to be seized but expressly incorporated an affidavit that did describe them? The parties do not dispute that: (1) the application for a warrant supplied by agent Johnson established "probable cause" that a crime had been committed and that evidence of that crime likely would be found at the place to be searched, U.S. Const. amend. IV; (2) agent Johnson "supported" the warrant application by "Oath or affirmation," *id.*; (3) the warrant "particularly describ[ed] the place to be searched"—namely, the Pars Warehouse, *id.*; and (4) "a neutral judicial officer"—here, a magistrate—legitimately approved the warrant, *Steagald* v. *United States*, 451 U.S. 204, 212 (1981).

Nor have the claimants shown that the agents failed to comply with the last requirement of the Warrant Clause—that the search warrant approved by the magistrate "particularly describ[e] . . . the persons or things to be seized." U.S. Const. amend IV. The officers presented two documents to the magistrate: a one-page "Search Warrant" and a ten-page "Application and Affidavit for Search Warrant." JA 115, 116. The one-page "Search Warrant" was a form document filled out

by agent Johnson that contained blank spaces for the magistrate (1) to approve and sign the warrant, (2) to state the date and time when the magistrate approved the warrant and (3) to limit the time within which the agents had authority to execute the warrant. JA 115. At the location on the form for identifying the items to be seized, agent Johnson referred to an attached affidavit ("See Attached Affidavit"), which identified the items that the agents sought permission to seize. *Id.* On appeal, no one disputes that the affidavit specifically described the items that the agents sought to find and seize. And no one disputes that agent Johnson presented both the warrant and the affidavit to the magistrate, as he independently signed each of them.

No doubt, "[t]he fact that the *application* adequately described the `things to be seized' does not save the *warrant*" from the risk of facial invalidity because "[t]he Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Groh*, 540 U.S. at 557. But, as *Groh* explained, "We do not say that the Fourth Amendment forbids a warrant from cross-referencing other documents." *Id.* And "[i]ndeed," as *Groh* further recognized, "most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Id.* at 557-58.

What doomed the warrant in *Groh* was not the existence of a supporting affidavit that particularly described the items to be seized, but the failure of the warrant to cross-reference the affidavit at all. "Although the application particularly described the place to be searched and the contraband petitioner expected to find, the warrant itself was less specific; it failed to identify

any of the items that petitioner intended to seize." *Id.* at 554. Rather, "[i]n the portion of the form that called for a description of the 'person or property' to be seized, petitioner typed a description of respondents' two-story blue house rather than the alleged stockpile of firearms." *Id.* And "[t]he warrant did not incorporate by reference the itemized list contained in the application." *Id.* at 554-55. Because the warrant at the time of issuance did not describe with particularity the items to be seized but instead referred to a "single dwelling residence two story in height which is blue in color" as the "concealed . . . property" to be seized, *id.* at 554 n.2, the warrant on its face failed to comply with the Warrant Clause. See Wayne R. LaFave, *Search and Seizure* § 4.6(a), at 619 (4th ed. 2004) (noting that *Groh* "covers . . . only" the situation where the warrant "'did not describe the items to be seized at all'") (quoting *Groh*, 540 U.S. at 558).

No equivalent problem occurred here. This warrant explicitly incorporated the supporting affidavit; the magistrate signed the affidavit and warrant; and the affidavit described with particularity the items to be seized. Rather than generally (and unintelligibly) authorizing the seizure of a two-story blue house, *Groh*, 540 U.S. at 554, this warrant authorized the seizure of 425 machine guns. Rather than leaving reviewing courts in doubt "whether the Magistrate was aware of the scope of the search he was authorizing," *id.* at 561 n.4, this warrant made it clear that the magistrate understood and cabined the scope of the search he was authorizing. And rather than leaving reviewing courts in doubt whether the magistrate provided "written assurance that [he] actually found probable cause to search for, and to seize, every item mentioned in the affidavit," *id.* at 560, this warrant and affidavit (and the magistrate's

signature on both of them) made it clear that the magistrate found that there was probable cause to support the search.

Consistent with *Groh*, all of the courts of appeals (save the Federal Circuit) have permitted warrants to cross-reference supporting affidavits and to satisfy the particularity requirement through an incorporated and attached document—at least when it comes to the validity of the warrant at the time of issuance. See *United States* v. *Riccardi*, 405 F.3d 852, 863 n.1 (10th Cir. 2005); *United States* v. *Miggins*, 302 F.3d 384, 395 (6th Cir. 2002); *United States* v. *Beaumont*, 972 F.2d 553, 561 (5th Cir. 1992); *United States* v. *Jones*, 54 F.3d 1285, 1290 (7th Cir. 1995); *United States* v. *Bianco*, 998 F.2d 1112, 1116-17 (2d Cir. 1993); *United States* v. *Towne*, 997 F.2d 537, 544 (9th Cir. 1993); *United States* v. *Washington*, 852 F.2d 803, 805 (4th Cir. 1988); *United States* v. *Vaughn*, 830 F.2d 1185, 1186 (D.C. Cir. 1987); *United States* v. *Johnson*, 690 F.2d 60, 64 (3d Cir. 1982); *United States* v. *Wuagneux*, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982); *United States* v. *Klein*, 565 F.2d 183, 186 n.3 (1st Cir. 1977), *United States* v. *Johnson*, 541 F.2d 1311, 1315 (8th Cir. 1976). We stand by this view today.

Third: even if the warrant satisfied the Warrant Clause at the time of issuance, did the ensuing search become warrantless, and therefore "presumptively unreasonable," *Payton*, 445 U.S. at 586, due to the manner in which the agents conducted the search? We think not.

The Warrant Clause contains four textual requirements, each of which places restrictions on the issuance of a warrant. "[N]o Warrants shall issue," it says, "but upon [1] probable cause, [2] supported by Oath or affirmation, and [3] particularly

describing the place to be searched, and [4] the persons or things to be seized." U.S. Const. amend. IV (emphasis added). By their terms, each of these requirements must be satisfied upon the "issu[ance]" of the warrant, and nothing about the text of the clause suggests that a warrant valid upon issuance may become invalid upon execution when the scope and timing of the search is conducted in accordance with the terms of the warrant.

Nor do the historical purposes of the clause suggest otherwise. The chief purpose of the particularity requirement was to prevent general searches by requiring a neutral judicial officer to cabin the scope of the search to those areas and items for which there exist probable cause that a crime has been committed. See *Stanford* v. *Texas*, 379 U.S. 476, 481 (1965) (outlining the history of "officers acting under the unbridled authority of a general warrant" and noting the need for independent approval of warrants by magistrates); *Muehler* v. *Mena*, 125 S.Ct. 1465, 1469 (2005) ("[T]he presence of a warrant assures that a neutral magistrate has determined that probable cause exists . . . ."); *Marron* v. *United States*, 275 U.S. 192, 196 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another.").

The "purpose of the particularity requirement," it is true, is not confined to the "prevention of general searches." *Groh*, 540 U.S. at 561. "A particular warrant also 'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" *Id.* (quoting *United States* v.

Chadwick, 433 U.S. 1, 9 (1977)). When the magistrate approved this warrant, however, it contained these assurances, as it restricted the items to be seized to weapons owned by Baranski. *United States* v. *Grubbs*, 126 S.Ct. 1494, 1501 (2006) (noting that "`the requirement of particular description does not protect an interest in monitoring searches'") (quoting *United States* v. *Stefonek*, 179 F.3d 1030, 1034 (7th Cir. 1999)).

Consistent with the language of the Warrant Clause and the historical purposes behind it, a search conducted in accordance with a valid warrant does not become warrantless, and therefore "presumptively unreasonable," due to the manner in which the officers conducted the search. As the Court has "[r]ecogniz[ed]," "the specificity required by the [Warrant Clause of the] Fourth Amendment does not generally extend to the means by which warrants are executed." *Dalia* v. *United States*, 441 U.S. 238, 257 (1979); see *Grubbs*, 126 S.Ct. at 1500-01 (noting that the "words of the Fourth Amendment" do not "`suggest[] that, in addition to the [requirements set forth in the text], search warrants also must include a specification of the precise manner in which they are to be executed'") (quoting *Dalia*, 441 U.S. at 255) (brackets supplied by *Grubbs*); *United States* v. *Basham*, 268 F.3d 1199, 1204 (10th Cir. 2001) ("[T]he question of whether the warrant itself is valid" "is an entirely different matter" from the more general Fourth Amendment reasonableness inquiry) (internal quotation marks omitted).

In contending that the agents conducted a warrantless search in this instance, Baranski and Pars target three alleged shortcomings: the agents did not hand Pars' attorney a copy of

the affidavit when he asked for it at the outset of the search; the agents did not bring the affidavit with them when they conducted the search; and the agents did not leave a copy of the affidavit with the warrant after the search. *Groh*, they claim, supports all three requirements and, most importantly, makes a search that fails to comply with them a warrantless, and thus "presumptively unreasonable," search. We do not agree.

The warrant in *Groh*, as shown, did not satisfy the particularity requirements of the Warrant Clause because it did not incorporate the affidavit that accurately described the items to be seized. Without something on the face of the warrant indicating the particulars of the items to be seized or incorporating a document that described those particulars, the Court reasoned that it could not "know whether the Magistrate was aware of the scope of the search he was authorizing." *Groh*, 540 U.S. at 561 n.4. Because the warrant "did not describe the items to be seized at all," the Court concluded that "the warrant was so obviously deficient that we must regard the search as 'warrantless' within the meaning of our case law." *Id.* at 558. No such problem infected this warrant.

Baranski and Pars persist that *Groh* is more than just a case about satisfying the Warrant Clause at the time of issuance through an incorporated affidavit. As they read the decision, it establishes an incorporate-and-produce and an incorporate-and-accompany requirement with respect to supporting affidavits: Not only must the warrant expressly incorporate the attached affidavit, which happened here, but the affidavit also (1) must be given to an occupant who requests it at the outset of the search, (2) must accompany the agents during the search and (3) must be left at the scene of the

search—all three of which did not happen here.

Groh, as an initial answer, provides scant support for holding that the failure to produce a warrant at the outset of a search makes the search a warrantless one. The Court acknowledged that the Fourth Amendment does not compel officers to present a warrant before a search. *Id.* at 562 n.5 ("[N]either the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing officer to serve the warrant on the owner before commencing the search."). And the Court disclaimed resolving whether officers must produce a warrant, to say nothing of a supporting affidavit, when the occupant requests it at the outset of the search. See *id.* ("Whether it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when, as in this case, an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission, is a question that this case does not present."). Even at that, the Court left open only the possibility that it would be "unreasonable" to decline such a request, not that the search would become warrantless if the agents declined such a request.

In the aftermath of the Court's most recent decision in this area, *United States* v. *Grubbs*, 126 S.Ct. 1494 (2006), the possibility that the Warrant Clause requires officers to produce a copy of the warrant (and any affidavit) at the outset of the search seems even less plausible. One question presented by *Grubbs* was whether officers must list the "triggering condition" in an anticipatory warrant in order to permit the owner of the property to "polic[e] the officers' conduct." 126 S.Ct. at 1501 (quotation omitted). In rejecting that argument, the Court reasoned that "[t]his argument assumes that the executing

officer must present the property owner with a copy of the warrant before conducting his search." *Id.* Yet there is no such requirement, the Court observed, and "'[t]he absence of a constitutional requirement that the warrant be exhibited at the outset of the search, or indeed until the search has ended, is . . . evidence that the requirement of particular description does not protect an interest in monitoring searches.'" *Id.* (ellipses supplied by *Grubbs*) (quoting *Stefonek*, 179 F.3d at 1034).

Nor, at any rate, would such a rigid rule lend itself to sensible application. Aside from the oddity of having the constitutionality of a search turn on the serendipity of whether the occupants happen to be present when the officers arrive, there doubtless will be times when officers could not reasonably be expected to comply with such a requirement. In carrying out a search, officers need not cooperate with uncooperative property owners or those who threaten to put the search at risk. See *Wilson* v. *Arkansas*, 514 U.S. 927, 936 (1995); *United States* v. *Banks*, 540 U.S. 31, 38 (2003). While the decision of officers not to present an incorporated affidavit to the occupant upon request may be a relevant factor in determining the reasonableness of a search, it does not make a warrant-supported search a warrantless one.

Groh contains some language in support of plaintiffs' second argument—that an incorporated affidavit must accompany the warrant at the time of the search. See 540 U.S. at 558 ("But in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been placed under seal) accompany the warrant."); *id.* at 560 ("But unless the particular items described in the affidavit are also set forth in the warrant itself (or at least

incorporated by reference, and the affidavit present at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit.").

Read in context, however, these passages do not establish the bright-line rule that Baranski and Pars advocate. As we have shown, *Groh* turns on the facial invalidity of the warrant, not the manner in which the officers conducted the search. Any doubt about the holding of *Groh* is removed when one reads the second part of the decision. There, in determining whether the officers had violated the claimants' clearly established constitutional rights, the Court indicated that the constitutional violation at issue was the facial insufficiency of the warrant, not the failure to incorporate the affidavit and bring it during the search. See *id.* at 563 ("Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."); *id.* at 564 ("[E]ven a cursory reading of the warrant in this case—perhaps just a simple glance—would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal."); *id.* ("[A]bsent consent or exigency, a warrantless search of the home is presumptively unconstitutional.").

What, then, should a lower court make of *Groh*'s reference to an incorporated affidavit being "present" at the search? One possibility is that the Court's reference to the absence of incorporation *and* to the absence of an accompanying affidavit was necessary to resolve the facial-invalidity problem at hand. In other words, the reasoning

of *Groh* (though perhaps not the result) might well have been different if the facially defective warrant had been attached to an affidavit signed by the magistrate that clearly corrected the omission and that accompanied the warrant during the search. The reference to the absence of any attached affidavit thus ensured that the Court was not directly resolving that issue.

Another possibility is that the Court was suggesting that officers generally should bring an incorporated affidavit (or an authenticated summary of the items to be seized) with them during the search and that the failure to do so may be a factor in determining whether the search was reasonable, two points with which we agree. If, say, a search involved otherwise fungible property that contained discrete identifying markers (*e.g.*, currency identified by serial number) and if only an incorporated affidavit described those markers, the absence of the affidavit on the scene could render the search unreasonable. *Cf. Jones*, 54 F.3d at 1292. But that does not establish that the absence of an incorporated affidavit during a search makes the search a presumptively unreasonable one in all settings, no matter whether the property owner was there, no matter how readily identifiable the subject of the search. The salient point is that *Groh* did not establish a one-size-fits-all requirement that affidavits must accompany all searches to prevent a lawfully authorized search from becoming a warrantless one.

Neither can we accept plaintiffs' last contention—that the Constitution demands that agents leave incorporated affidavits (or authenticated summaries of them) at the scene of the search on pain of the search being treated as warrantless. In some settings, such an unyielding requirement would make little sense. How, for example, would officers execute a warrant for

a wiretap? The Constitution does not require officers to leave a copy of the warrant next to every phone upon which a bug has been placed or next to every phone that has been wiretapped. See *Dalia*, 441 U.S. at 248 (holding that the Fourth Amendment does not require notice of the execution of warrants that depend on covert action to be successful). At the same time that *Groh* acknowledged this reality, see 540 U.S. at 562 n.5, it never said that the failure to leave an incorporated affidavit (or authenticated summary) at the scene of the search renders the search presumptively unreasonable.

Rule 41(f) of the Federal Rules of Criminal Procedure also fails to supply any traction for this argument. See Fed. R. Crim. P. 41(f)(3)(A) (indicating that an officer must "give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken"). For one, the warrant and inventory were left with Shafizadeh after the search, and plaintiffs have not identified any case law establishing that the failure to leave a sealed affidavit with the warrant violates Rule 41(f). For another, even a violation of the Federal Rules by itself would not establish a constitutional violation, which is what plaintiffs must establish in order to obtain money damages in this *Bivens* action. See *Bivens*, 403 U.S. at 397.

In the end, *Groh* does not alter the traditional assumption "that the specificity required by the [Warrant Clause of the] Fourth Amendment does not generally extend to the means by which warrants are executed." *Dalia*, 441 U.S. at 257. In contrast to presumptively fatal failures to comply with the Warrant Clause's particularity requirement, the question here is whether the agents acted reasonably in conducting the

search under the totality of the circumstances. The latter inquiry does not submit to an across-the-board requirement, and we see no indication in *Groh* or in any other decision that the Court meant to establish one. To say that a warrant satisfies the Warrant Clause upon issuance, however, by no means establishes that a search satisfies the Reasonableness Clause upon execution, which prompts the last question presented.

Fourth: even if the agents satisfied the Warrant Clause, did they nonetheless violate the Reasonableness Clause when they conducted the search? We conclude that they did not.

When a search requires a warrant, the failure to satisfy the Warrant Clause makes the search "presumptively," if not per se, "unreasonable." *Payton*, 445 U.S. at 586; *Katz* v. *United States*, 389 U.S. 347, 357 (1967). The opposite, however, is neither presumptively nor absolutely true. Even when officers have complied with the Warrant Clause in obtaining authorization for a search, that does not insulate the search from challenge. While a warrant may circumscribe an officer's authority, that does not mean the officer adhered to that limitation and does not mean that what started as a particularized search did not become a general one. To satisfy the Reasonableness Clause, officers not only must obtain a valid warrant but they also must conduct the search in a reasonable manner. See *Dalia*, 441 U.S. at 257 ("[I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'") (footnote omitted). "The general touchstone of reasonableness which governs Fourth Amendment analysis

governs the method of execution of the warrant." *United States* v. *Ramirez*, 523 U.S. 65, 71 (1998) (citation omitted).

Illustrating the point: in establishing that officers generally must alert homeowners to their presence before executing a search warrant, the Court has noted that "an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment" even though the search was supported by a valid search warrant. *Wilson*, 514 U.S. at 934; see *Banks*, 540 U.S. at 36 (same); *Richards*, 520 U.S. at 387 (same). This limitation on the execution of a valid search warrant extends beyond the setting of the Court's knock-and-announce rulings, and we see no reason why it would not extend here. See *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979) (holding that where a judge accompanies police officers on a search to broaden the scope of the warrant as the search progresses, the search is unreasonable despite an initially valid warrant); *United States* v. *Tucker*, 313 F.3d 1259, 1265 (10th Cir. 2002) (noting that under certain circumstances a nighttime search may be unreasonable despite the issuance of a valid warrant).

In answering the fundamental inquiry of whether this search was reasonable, we of course look at "the totality of the circumstances." *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996). When agent Johnson and the other agents arrived at the scene, they had a valid search warrant, which they gave to Shafizadeh upon arriving at the warehouse and upon asking to enter it. The face of the warrant showed that an independent judicial officer had approved the search of the bonded section of the warehouse. When Shafizadeh asked to see a copy of the incorporated affidavit, agent Johnson, who wrote and signed the

affidavit, explained that it was under seal but then proceeded to tell him orally what the warrant and affidavit authorized them to seize, namely 425 machine guns owned by Baranski and located in the customs bonded portion of the warehouse. *Cf. Groh*, 540 U.S. at 563 (reasoning that the officers orally explained to the property owner only that they were looking for "'an explosive device in a box,'" which was "little better than no guidance at all"); *id.* at 562 (declining to resolve whether the presence of the affiant to explain the scope of the search may provide "all of the notice that a proper warrant would have accorded").

There was nothing unduly complex about the object of the search that would have prevented agent Johnson from remembering precisely what he had authority to search for and to seize. *Cf. Jones*, 54 F.3d at 1292; *United States* v. *Stefonek*, 179 F.3d 1030, 1034-35 (7th Cir. 1999) (noting that the warrant may prove a useful tool to the executing officers in ensuring that their search remained within the scope approved by the magistrate and concluding that these considerations were useful for determining the reasonableness of a search but did not make them constitutionally required). And no suggestion has been raised that producing the affidavit was necessary to defuse a potential "breach[] of the peace." *Stefonek*, 179 F.3d at 1035.

The record also shows that once Shafizadeh agreed to let the agents into the warehouse, the agents conducted the search in a reasonable manner. The day before the search, agent Johnson met with the other agents and laid out a plan for executing the warrant, which included a description of the guns to be seized, a map of the warehouse, the specific location within the warehouse where the guns would be seized, the identity of Shafizadeh as the appropriate warehouse contact and

other information relevant to the search. On the day of the search, agent Johnson helped to direct the officers in seizing Baranski's machine guns. See *United States* v. *Dale*, 991 F.2d 819, 848 (D.C. Cir. 1993) (noting that the presence of the agent "who prepared the affidavit and obtained the warrant" to "over[see] the warrant's execution and guide[] the participating agents" "sufficiently limited the discretion of the executing agents").

The agents seized no more than was authorized by the warrant—Baranski's machine guns and associated crates of accessories—and searched no more of the warehouse than was necessary to seize these weapons. When the search was complete, the agents left a copy of the warrant and a complete inventory of items seized, both of which provided Baranski and Pars all of the information they needed to attempt to unseal or partly unseal the affidavit. By all accounts, the agents conducted the search consistently with the constitutional guidelines set out in Supreme Court precedent and made efforts both to circumscribe their search to the approved scope of the warrant and to diminish the likelihood of conflict at the scene. *Frisby* v. *United States*, 79 F.3d 29, 32 (6th Cir. 1996) ("Here, plaintiff was not prejudiced by the agents' failure to furnish him with Attachment A prior to the search. Agents conducted the search in accordance with the warrant and seized only those items enumerated in Attachment A. Further, agents provided plaintiff with an inventory of seized property prior to leaving his premises and subsequently provided him with a copy of Attachment A. Finally, plaintiff's legal remedies were in no way affected by the unintentional failure to serve him with a copy of Attachment A prior to the search."); *Dale*, 991 F.2d at 848 (per curiam, including then-Judge Ruth Bader Ginsburg) ("Agent

Shintani, who prepared the affidavit and obtained the warrant, was present at the search, oversaw the warrant's execution and guided the participating agents in seizing documents to conform the search to her understanding of the warrant's requirements. While it is not altogether clear that the affidavit accompanied the warrant at the search, we are satisfied that the precautions taken by the government sufficiently limited the discretion of the executing agents.").

Although it is true that the agents did not supply a written document explaining what they were authorized to seize, they orally told the owner's agent what they had permission to seize and left him with ample information to obtain the affidavit or an authenticated summary of it. Indeed, while Baranski and Pars filed a motion to unseal the affidavit on July 5, 2001, which was eventually granted, they never sought in the interim to obtain an authenticated summary of the affidavit itemizing the property that could be seized—undermining any claim that they were prejudiced by the method of the agents' search.

This approach, moreover, is consistent with our own decisions. See *Frisby*, 79 F.3d at 31-32 (concluding that where the affiant is at the scene, the warrant is validly approved and the search is confined to the approved corners of the warrant, the search is valid despite the absence of the affidavit); *United States* v. *Gahagan*, 865 F.2d 1490, 1497 (6th Cir. 1989) (concluding that where the warrant is valid, the search is conducted in accordance with the warrant and the affiant is there to answer questions and direct his fellow officers, the search is valid despite the absence of the affidavit); *cf. Dale*, 991 F.2d at 847-48 (concluding that the availability of the

affiant at the scene of the search to answer the questions of both the property owners and the executing officers was sufficient to excuse the absence of the affidavit during the search).

Doubtless, the agents would have been wiser to bring a written summary of the items to be seized (presumably signed by the magistrate) or to list the items to be seized in the warrant itself. There seems to be little doubt (and none has been offered by the United States) that agents who choose to rely on an incorporated affidavit typically have good reason and ample means to avoid complaints like this one. But the question is whether the Fourth Amendment demands these things, even when the purposes of doing them have been satisfied and even when the failure to do them has not prejudiced the property owners. On this record and under these circumstances, we hold that no constitutional violation occurred..

B.

But even if that were not the case, even if the search violated the Fourth Amendment, it did not violate "clearly established" law. *Saucier*, 533 U.S. at 201; *see Brosseau v. Haugen*, 543 U.S. 194 (2004) (holding that qualified immunity is appropriate unless either a precedent "squarely governs" the outcome of the case or the case is so "obvious" that "general tests . . . 'clearly establish' the answer, even without a body of relevant case law"). A right is "clearly established," the Supreme Court has said, when it is no longer among the "hazy" area of constitutional issues that might be "reasonably misapprehend[ed]" by a law enforcement officer at the scene. *Brosseau*, 543 U.S. at 198.

One indicator that this alleged Fourth Amendment right,

at a minimum, remained in a "hazy" area of constitutional meaning that law enforcement agents might "reasonably misapprehend" is the fact that the Eighth Circuit (on plaintiff's theory) apparently "misapprehend[ed]" this area in assessing a suppression motion arising from this precise search. In Baranski's direct criminal appeal, a panel composed of Judges Melloy, R. Arnold and Fagg concluded in an unpublished per curiam opinion that "[t]he warrant should not have been suppressed for lack of particularity" under the *Leon* good-faith doctrine. *United States v. Baranski*, 75 Fed.Appx. 566, 568 (8th Cir.2003). When a sister court of appeals concludes on the exact facts presented to us that government agents acted in good faith in executing *this* warrant, it seems fair to say that the issue at a minimum involves a "hazy" area of constitutional law, one that we should be reluctant to tell agents they were delinquent in failing to appreciate. *See Groh*, 540 U.S. at 565 n. 8 (noting that the *Leon* good-faith inquiry and the qualified-immunity inquiry are one and the "same.").

Even aside from this mirror-image precedent from another circuit, the prevailing law in *this* circuit would have led reasonable agents to believe that their conduct was legal at the time they conducted the search. In *Frisby v. United States*, 79 F.3d 29 (6th Cir.1996), the government inadvertently failed, at the time of the search, to include an attached affidavit with the warrant that referenced it. Yet the agents provided an inventory, took only what they should have taken and subsequently provided the defendant with a copy of the attached affidavit. No Fourth Amendment violation occurred on these facts, we held. 79 F.3d at 32. In *United States v. Gahagan*, 865 F.2d 1490 (6th Cir.1989), we upheld a search where the warrant did not correctly describe the place to be searched but

contained an incorporated affidavit that did describe the location. *Id.* at 1497. Even though the affidavit was left behind in the police car during the search, rather than attached to the warrant, the court upheld the search. *Id.*

In an unpublished opinion decided after the search at issue in this case, we concluded that where the warrant referred the reader to "attachment B" in the description of things to be seized, but the police failed to bring the attachment with them at the time of the search, the search was still valid. *See United States v. Pritchett,* 40 Fed.Appx. 901, 907 (6th Cir.2002). As here, the attachment had a sufficient description of the objects at issue but was not with the agents when they conducted their search. And, as here, the attachment was appended to the warrant application at the time of issuance and was subsequently placed under seal. The court held that because the affiant led the search, the agents orally communicated to the occupant what they were looking for before they performed their search and the agents provided him with a receipt afterwards, "[t]he Fourth Amendment's requirements were satisfied." *Id.*

In addition to our circuit and the Eighth Circuit, other appellate courts have rejected similar claims either because they did not state a constitutional violation or because they did not defeat a *Leon* good-faith defense. *See Mazuz v. Maryland,* 442 F.3d 217, 229 (4th Cir.2006) (holding that the fact that the officer "did not carry the warrant with him during the actual raid" was not unreasonable because "it is undisputed that [the officer] knew at all times that the warrant authorized him to enter room 5110"); *United States v. Jones,* 54 F.3d 1285, 1292 (7th Cir.1995) (holding that the fact that the affidavit was not

at the scene of the search did not violate the Fourth Amendment because "the officer in charge of conducting the search . . . had in his possession the serial numbers of the currency listed in the affidavit, . . . he limited the search to those items described in the warrant, and . . . he made a return to the magistrate that conformed to the warrant and affidavit") (internal quotation omitted); *United States* v. *Dale*, 991 F.2d 819, 848 (D.C.Cir.1993) ("While it is not altogether clear that the affidavit accompanied the warrant at the search, we are satisfied that the precautions taken by the government sufficiently limited the discretion of the executing agents," including the precaution that the search "was executed by the affiant pursuant to a specific plan"); *Colorado v. Staton*, 924 P.2d 127, 132 (Colo.1996) (holding that even where an affidavit is necessary to establish the particularity of the warrant "the execution of the search warrant under the supervision and control of the officer who is the affiant obviates the necessity for the affidavit to accompany the warrant when it is executed"); *cf. United States v. Stefonek*, 179 F.3d 1030, 1033 (7th Cir.1999) (holding that where the affidavit describing the items to be seized was not with the officers at the time of the search, evidence should not be excluded under *Leon* because the search "conformed to the particular description in the affidavit of the things to be seized, . . . [a]mong the agents who executed the search were the very agents who had prepared the application for the warrant . . . [and] they knew the limited scope of the application . . . . The search would thus have been identical in scope, and exactly the same evidence would have been seized, had the warrant complied with the Constitution, which is to say, had the warrant repeated the application's description of the things to be seized").

The Ninth Circuit, we recognize, has charted a different path. It has held that an affidavit necessary to satisfy the particularity requirement not only must be incorporated into the warrant but also must accompany the warrant at the scene. *See, e.g., United States v. McGrew*, 122 F.3d 847, 850 (9th Cir. 1997). But this disagreement among the circuits at the time of the search, to say nothing of the weight of the authority in our circuit and elsewhere favoring the defendants' assessment of these constitutional issues, shows that the agents did not violate clearly established law. *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999) (noting that when judges "disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy").

Groh does not alter this conclusion. The Court could criticize that search as warrantless because the warrant contained a "glaring deficiency" upon issuance recognizable by "any reasonable police officer," 540 U.S. at 564: Namely, in the section calling for "a description of the 'person or property' to be seized," *id.* at 554, 124 S.Ct. 1284, the agent typed "single dwelling . . . blue in color," *id.* at 554, n. 2. When the magistrate signed the warrant, this description was the only one regarding the items that could be seized. *Id.* Such a warrant, the Court concluded, was "facial[ly] invalid[ ]," *id.* at 557, and because "the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid," *id.* at 563. Absent any evidence on the face of the warrant that it incorporated the attached affidavit, the Court concluded, the warrant was "manifestly invalid," "warrantless" and thus "constitutionally fatal." *Id.* at 564.

Today's facts offer a poor analogy. At the time of issuance, this warrant specifically incorporated the affidavit ("See Attached Affidavit"), which in turn particularly described the items to be seized. Far from invalidating incorporated affidavits, *Groh* recognized that they may satisfy the particularity requirement, and in this case no one disputes that the warrant upon issuance appropriately incorporated the affidavit and that the magistrate reviewed, approved and signed the warrant and affidavit. At the time of issuance, in marked contrast to *Groh*, no amount of study by the agents or the magistrate would have revealed a constitutional infirmity in the warrant.

Nor did *Groh* say that it was clearly established that a warrant valid upon issuance becomes invalid upon execution if the incorporated affidavit does not accompany the search. The words of the Constitution, to which the Court referred in concluding that the *Groh* warrant was facially invalid, establish particularity requirements that apply by their terms upon the "issu[ance]" of a warrant, not upon the execution of it. Whether a particularized warrant at the time of issuance may become an unparticularized warrant when a cross-referenced affidavit does not accompany the search remains a matter of continued debate among the circuits and remains an issue that neither the text of the Fourth Amendment nor *Groh* resolves. We thus conclude that even if this search had violated the Fourth Amendment right, it did not violate "clearly established" constitutional law, and accordingly the agents should receive qualified immunity.

III.

For these reasons, we affirm.

CONCURRING IN JUDGMENT

RONALD LEE GILMAN, Circuit Judge, with whom MARTHA CRAIG DAUGHTREY, Circuit Judge, joins, concurring in the judgment. I concur in the result reached by the majority opinion because I believe that the government officials in this case are entitled to qualified immunity. The majority's discussion of this issue in Part II.B. strikes me as persuasive. I do not believe that the Supreme Court's decision in *Groh v. Ramirez*, 540 U.S. 551, 553, 557 (2004), which was decided three years after the search in question, retroactively caused the Fourth Amendment violation to be clearly established at the time of the search. This is especially so in light of the then-existing Sixth Circuit precedent to the contrary.

But I agree with Part II.A. of Judge Clay's dissent, which explains why Baranski's Fourth Amendment rights were violated. The language and policy reasons set forth in *Groh* indicate that if a warrant fails to list the items to be seized, it is defective unless a list of those items is explicitly incorporated into an affidavit that is present at the scene of the search. Although the Supreme Court has never addressed the question of whether officers are required to present a search warrant to the subject of a search upon request, a warrant's particularity requirement is based on the text of the Constitution and therefore must be complied with even if the subject never views the warrant. In this case, I believe that the search warrant as executed was not sufficiently particular. I therefore concur only in the result reached by the majority.

DISSENT

CLAY, Circuit Judge, with whom MARTIN, MOORE, and COLE, Circuit Judges, join, dissenting. Today, the majority concludes that a valid search warrant need not describe with particularity "the persons or property to be seized," so long as an affidavit, neither attached to the warrant nor present at the scene of the search, describes such items. Because I believe the majority's position to be in error, I respectfully dissent. Not only is the use of a such a warrant contrary to the plain language of the Fourth Amendment and the Supreme Court's recent decision in *Groh v. Ramirez*, 540 U.S. 551, 559 (2004), but the use of such a warrant violates an individual's clearly established right to be free from unreasonable searches and seizures. Accordingly, I would deny Defendants qualified immunity and reach the issue of whether *Heck v. Humphrey*, 512 U.S. 477 (1994), bars Plaintiffs' Fourth Amendment claims. Inasmuch as *Heck* does not bar all of Plaintiffs' claims, I would reverse the order of the district court and remand for trial.

I.

This case comes before us as an appeal of a district court's grant of summary judgment in favor of Defendants. We review a district court's decision to grant summary judgment *de novo*. *Kalamazoo Acquisitions v. Westfield Ins. Co.*, 395 F.3d 338, 341 (6th Cir.2005). Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a

judgment is proper as a matter of law." Fed.R.Civ.P. 56(c). "The district court, and this court in its review of the district court, must view the facts and any reasonable inferences drawn from them in the light most favorable to the party against whom judgment was entered." *Kalamazoo Acquisitions*, 395 F.3d at 342 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The court may neither weigh the evidence nor make credibility determinations. *Logan v. Denny's Inc.*, 259 F.3d 558, 570 (6th Cir.2001).

II.

The majority errs in affirming the district court's determination that Defendants are entitled to qualified immunity in the instant case. A government official is not entitled to qualified immunity if the plaintiff alleges facts that, if true, establish that the official violated the plaintiff's clearly established federal rights. *Saucier v. Katz*, 533 U.S. 194, 200-02 (2001); *Wilson v. Layne*, 526 U.S. 603, 614 (1999); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In determining whether the plaintiff has adequately alleged that an official violated a clearly established federal right, the Supreme Court has instructed courts first to assess whether the defendant-official violated the plaintiff's federal right, and then address whether the right was clearly established at the time the official acted. *Saucier*, 533 U.S. at 200-01. In the instant case, Defendants executed a search of Plaintiffs' property pursuant to a search warrant that failed to state with particularity the items to be seized in violation of the Fourth Amendment. Inasmuch as this right was clearly established in April 2001, when Defendants executed the search of Plaintiffs' property, Defendants are not entitled to qualified immunity on Plaintiffs' Fourth Amendment claim.

A. Constitutional Violation

The Fourth Amendment prohibits the government from conducting unreasonable searches and seizures. It states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the person or things to be seized.

U.S. Const. amend IV. The long-standing jurisprudence of the Supreme Court makes clear that a search is generally unreasonable within the meaning of the Fourth Amendment unless it is authorized by a *valid* warrant. *Groh*, 540 U.S. at 559 (citing *Payton v. New York*, 445 U.S. 573, 586 (1980)); *Camara v. Muni. Court*, 387 U.S. 523, 528-29 (1967). Importantly, the warrant need not only be valid when issued, but also when the search is conducted, to comply with the reasonableness requirement. *See* Wayne R. LaFave, *Search and Seizure* § 4.7(a), 646-48 (4th ed.2004) (stating that the execution of a validly issued warrant violates the Fourth Amendment if probable cause dissipates before the execution). In order to be valid, a warrant must state, with particularity, the items to be seized. U.S. Const. amend IV; *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). "'The test for determining whether the description in the warrant is sufficient to satisfy the particularity requirement [of the Fourth Amendment] is whether

'the description is such that the officers can with reasonable effort ascertain and identify the [items] intended [to be seized].' '" *United States v. Watkins*, 179 F.3d 489, 494 (6th Cir.1999) (quoting *Steele* v. United States, 267 U.S. 498, 503 (1925) and *United States v. Votteller*, 544 F.2d 1355, 1362 (6th Cir.1976)). A warrant does not meet the Fourth Amendment's particularity clause where it fails to "describe the items to be seized *at all*." *Groh*, 540 U.S. at 558. An adequate description is not rendered invalid, however, simply because it "omits a few items from a list of many," or "misdescribe[s] a few of several items." *Id.* Similarly, mere typographical errors do not render a warrant invalid. *Id.*

The primary purpose of this particularity requirement is to limit the discretion of the officer executing the warrant, thereby preventing the officer from conducting a general search. *Garrison*, 480 U.S. at 84. As the Supreme Court explained in *Camara*, a particular warrant insures that the officer's discretion is limited both by interposing the judgment of a neutral magistrate and by alerting the individual whose person or property is being searched of the boundaries of that officer's legal authority. 387 U.S. at 533.

The warrant at issue in this case was "plainly invalid" inasmuch as it did not describe the items to be seized at all, let alone with particularity. Where the warrant called for a description of the person or property to be seized, it stated "See Attached Affidavit." (J.A. at 91.) No Affidavit was ever attached to the warrant, however, as the affidavit was sealed at the same time the warrant was issued pursuant to the government's request. Thus, the ATF's search was conducted pursuant to an invalid warrant, which failed to describe the

property to be seized with particularity in violation of the Fourth Amendment.

The majority erroneously concludes that the warrant was sufficiently particular only by misconstruing the Supreme Court's recent decision in *Groh v. Ramirez*, 540 U.S. at 551. In *Groh*, the Supreme Court addressed the validity of a warrant that failed to describe the items to be seized. *Id.* at 554-55. Where the warrant called for a description of the items to be seized, the petitioning officer entered a description of the property to be searched. *Id.* The Supreme Court held that the warrant was "plainly invalid" despite the fact that the affidavit upon which the warrant was based described the items to be seized with particularity. *Id.* at 557. The Supreme Court reasoned that the "Fourth Amendment by its very terms requires particularity in the warrant, not in the supporting documents." *Id.*

Although the Supreme Court declined to address the issue of accompaniment expressly in *Groh*, as the warrant in *Groh* did not incorporate the affidavit, the *Groh* opinion makes it inescapably clear that a warrant cannot satisfy the particularity clause of the Fourth Amendment by reference to an affidavit that is not present at the scene of the search. The *Groh* opinion contains numerous statements indicating that an affidavit must actually accompany the warrant in order to cure a deficiency in particularity. For example, the opinion states: "But unless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, *and the affidavit present at the search*) there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit."

Id. at 560 (emphasis added). Additionally, the opinion provides: "The *presence* of a search warrant served a high function . . . and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched or available for inspection," *id.* at 557 (emphasis added), and "[b]ecause [the executing officer] did not have in his *possession* a warrant particularly describing the things he intended to seize, proceeding with the search was clearly 'unreasonable' under the Fourth Amendment," *id.* at 563 (emphasis added). These statements in *Groh* emphasize that the *description itself* must be present at the scene of the search in order for the search to be reasonable.

Most importantly, however, the rationale behind *Groh* compels the conclusion that a warrant does not satisfy the particularity requirement unless the incorporated affidavit is present at the scene of the search. The *Groh* court explained that the Fourth Amendment requires that a warrant describe with particularity the items to be seized not only to prevent general searches but also to " 'assure[ ] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" *Id.* at 561 (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (citing *Camara*, 387 U.S. at 532)). A warrant that incorporates an affidavit that is not present at the search cannot serve this function. *Id.* at 557. Without seeing a copy of the affidavit, the individual whose property is being searched or seized has no way to know the limits of the officer's authority. *See* Larry EchoHawk & Paul EchoHawk, *Curing a Search Warrant That Fails to Describe The Place to be Searched*, 35

Idaho L.Rev. 1, 25-26 (1998) ("Incorporation, however, is not a sufficient limitation by itself. Incorporation merely brings to the attention of those involved the fact that an additional document must be referenced. If the additional document is not available or not in fact used, incorporation may show the intent of the magistrate but may not limit the actual search when it is performed.").

Not surprisingly, at least one scholar who has addressed the meaning of *Groh* reached the same conclusion: that *Groh* renders warrants that fail to describe the items to be seized invalid, unless an affidavit or application describing the items is 1) expressly incorporated, *and* 2) present at the scene of the search. LaFave, *supra*, § 4.6(a), 616. Quoting *Groh* 's reference to the prevailing theory among Courts of Appeals-that a warrant that fails to meet the particularity requirement may be cured only if the underlying affidavit is incorporated *and* attached to the warrant-LaFave concludes:

> [I]t is clear that the Court in *Groh* has accepted and adopted the incorporation/accompanying approach, without specifically saying so . . . the court hangs this conclusion *not* on the particularity-of-description function of advising the executing officers what to search for and seize, but rather on the function of notice to the person who premises are being searched.

Id. Given the tone and overall import of the *Groh* opinion, LaFave's conclusion is clearly correct.

Nonetheless, the majority holds that *Groh* does not

apply to the facts of this case because *Groh* did not address accompaniment. According to the majority, "what doomed the warrant in *Groh* was not the existence of a supporting affidavit that particularly described the items to be seized, but the failure of the warrant to cross-reference the affidavit at all." Thus, the majority reasons, *Groh* does not control the facts of this case because the affidavit was properly incorporated.

The problem with the majority's argument is two-fold. First, the issue in this case is not whether the Fourth Amendment's warrant clause permits incorporation; rather, the issue is whether incorporation alone is sufficient to cure a warrant that is invalid for lack of particularity, or whether the incorporated affidavit must accompany the warrant in order to cure its deficiency. Thus, *Groh* is not inapplicable simply because it declined to expressly address accompaniment. Second, *Groh* does not hold that the warrant "was doomed" simply because it failed to cross reference the relevant affidavit. *See Groh*, 540 U.S. at 557. Instead, after noting that the prevailing practice in federal courts of appeals is to allow incorporation where the warrant used express words of reference and the incorporated documents accompanied the warrant, *Groh* explained, "But in this case the warrant did not incorporate other documents by reference, *nor did either the affidavit or the application* (which had been placed under seal) *accompany the warrant.*" *Id.* (emphasis added). Rather, the warrant was "doomed" both because it failed to both reference the affidavit *and* because the affidavit did not accompany the warrant. *See id.*

The sole argument of the majority that carries any weight is that neither the Fourth Amendment nor the Federal

Rules of Criminal Procedure always require an executing officer to present a warrant to the individual whose premises are being searched before commencing the search. Thus, the majority reasons, there is no reason to require an incorporated affidavit to be attached to the search warrant and present at the search. This argument, while having facial appeal, does not withstand appropriate analysis inasmuch as the majority's argument is inapplicable to the facts of this case. Although it is clear that the Fourth Amendment and the Federal Rules of Criminal Procedure do not *always* require an officer to present the warrant *prior* to the search, *see United States v. Grubbs*, 547 U.S. ----, ---- (2006), *Groh*, 540 U.S. at 562 n. 5, the Supreme Court has expressly reserved the question of whether an officer's refusal to present a warrant to the individual being searched when the individual expressly requests to see the warrant is "reasonable" within the meaning of the Fourth Amendment,[1] *Grubbs*, 547 U.S. at — (Souter, J., concurring), *Groh*, 540 U.S. at 562 n. 5. In this case, Plaintiffs' employee, Shafizadeh, expressly requested to see the warrant. Thus, it follows that whether Shafizadeh was entitled to see the warrant in the case at hand is undecided, and the majority's reasoning assumes a legal conclusion-that the individual being searched has no right to see the warrant-that may or may not be correct.

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[1] I would hold that an officer's refusal to furnish the warrant to an individual whose premises are being searched upon the individual's request is unreasonable within the meaning of the Fourth Amendment. This conclusion is unnecessary to our holding, however, inasmuch as the Supreme Court's decision in *Groh* squarely controls the outcome of this case. Under *Groh*, the warrant in this case was facially invalid, rendering the search unreasonable within the meaning of the Fourth Amendment. *See Groh*, 540 U.S. at 558. I mention this only to point out the fallacy of the majority's attempt to undermine the notice function of the particularity clause as set forth in *Groh*.

Grubbs, 547 U.S. at — (Souter, J., concurring), *Groh,* 540 U.S. at 562 n. 5.

Furthermore, a search warrant's presence at the scene of the search does more than simply inform the individual of the officer's authority; it also informs the officers of the limits of their authority. The Sixth Circuit itself has recognized this rationale on several occasions. *See United States v. Pritchett,* 40 Fed.Appx. 901, 907 (6th Cir.2002); *United States v. Gahagan,* 865 F.2d 1490, 1497 (1989). In fact, this rationale is the basis of the Sixth Circuit rule that an incorporated affidavit generally must be attached to the warrant. *See Pritchett,* 40 Fed.Appx. at 907; *Gahagan,* 865 F.2d at 1497-99.

Although it is true that the Sixth Circuit formerly recognized an exception to the attachment rule where the officer who authorized the incorporated affidavit also executed the search, *Pritchett,* 40 Fed.Appx. at 907; *Gahagan,* 865 F.2d at 1497-99, and this exception would have been applicable on the facts of this case, *Groh* overruled this exception. As will be discussed in more detail *infra, Groh* also involved an affidavit authored by the executing officer, and yet the Supreme Court laid out a rule requiring the affidavit to be present at the scene of the search. *See Groh,* 540 U.S. at 554-55, 558-63. Moreover, the Supreme Court's rejection of the Sixth Circuit's exception was logical inasmuch as one officer's knowledge of the contents of an incorporated affidavit does not alone insure that the other executing officers have knowledge of its contents. Additionally, relying on an officer's memory of an affidavit seems unnecessarily risky.

Finally, the Supreme Court instructed us in *Groh* that a facially invalid warrant remains invalid, unless cured by proper incorporation and accompaniment. Proper accompaniment requires the incorporated affidavit to be attached to the warrant, or at the very least, present at the scene of the search. The majority is not free to ignore the Supreme Court's instructions simply because it finds the Supreme Court's rationale unpersuasive.

The Supreme Court's recent decision in *United States v. Grubbs*, 547 U.S. at — , lends no support to the majority's argument. *Id.* The *Grubbs* opinion addresses a different issue. In *Grubbs*, the Supreme Court unanimously held that the Fourth Amendment did not require the "triggering conditions" of anticipatory search warrants to be set forth on the face of the warrant. *Id.* at ---. The Supreme Court reasoned that the Fourth Amendment "specifies only two matters that must be particularly described in the warrant: 'the place to be searched' and 'the persons or things to be seized.' " *Id.* Inasmuch as the text of Fourth Amendment does not require triggering conditions to be set forth on the face of a warrant, the Supreme Court declined to read such a requirement into the Fourth Amendment for the purpose of assuring the person being searched of the officer's legal authority. *Id.* at ---. The Court passingly noted that "this argument assumes that the executing officer must present the property owner with a copy of the warrant before conducting his search [but] in fact . . . neither the Fourth Amendment nor Rule 41 impose such a requirement." *Id.* at —.

The Supreme Court's rejection of the defendant's argument in *Grubbs*-that the notice function of the particularity

clause requires triggering conditions to be set forth on the face of a warrant-does not alter the relevance of the particularity clause's notice function in this case. A crucial distinction between the case at hand and *Grubbs* is that this case, like *Groh*, addresses "items to be seized" whereas *Grubbs* addressed "triggering conditions." The text of the Constitution requires the items to be seized to be set forth on the face of a warrant. U.S. Const. amend. IV. In contrast, the text of the Constitution does not require that "triggering conditions" be set forth on the face of a warrant. *Id.* Inasmuch as the text of the Fourth Amendment does not require "triggering conditions" to be set forth on the face of a warrant, the notice function of the particularity clause is an insufficient reason to impose such a requirement. *See Grubbs*, 547 U.S. at — .

To say that the notice function of the particularity clause is an insufficiently substantial reason to create an extra-textual requirement for warrants, however, is not to say that an existing textual requirement of the particularity clause does not protect an individual's interest in being notified of the officer's authority and its limits. *See id.* at --- (Souter, J., concurring). In other words, *Grubbs* does not prohibit this Court from considering the notice function of the particularity clause in determining how best to implement the Fourth Amendment's dictate that "items to be seized" be set forth on a warrant because *Grubbs* addresses not whether the notice function should be considered when determining how to implement the Fourth Amendment's express dictate that "items to be seized" be set forth "on the face of a warrant," but whether the notice function is a sufficiently important reason to impose additional, extra-textual requirements. *Id.* at ---. Rather, that is the province of *Groh*, and *Groh* has held that the notice function of

the particularity clause is relevant to whether a warrant complies with the particularity clause's textual requirement that items "to be seized" be set forth on the face of the warrant. *See Groh*, 540 U.S. at 557-563 (discussing the purpose of the particularity clause). Because the instant case involves this textual requirement of listing the items to be seized, *Groh* and not *Grubbs* controls. Accordingly, this Court should consider the notice function of the particularity clause in determining whether the warrant in this case was facially deficient. *See id.*

The weakness of the majority's position is evidenced by its attempt to buttress its primary argument, the argument addressed above, with collateral arguments. For example, the majority contends that the Constitution does not require officers to leave warrants at the scene of the search even after the search is completed because it would be impossible to do so in a wiretap search. (Maj. Op. at 453 - 455.) Exceptions, however, do not create the rule. The Constitution has countless requirements for which the Supreme Court makes exceptions. In fact, the warrant requirement itself is open to numerous exceptions, including exigent circumstances. *See, e.g., Brigham City v. Stuart*, 547 U.S. ---- - ---- (2006) (exigent circumstances); *Georgia v. Randolph*, 547 U.S. ----, ---- (2006) (consent); *Payton v. New York*, 445 U.S. 573, 576 (1980) (prohibiting warrantless entry to suspect's home in order to make a routine felony arrest). Thus, to hold that the Constitution does not require officers to leave warrants at the scene of the search after they complete the search simply because it would be impractical to do so in a narrow set of circumstances defies Supreme Court precedent and logic.

Furthermore, although the majority attempts to obscure this fact, the Supreme Court has not held that the Constitution never requires officers to leave warrants at the scene of the search after the search is completed, but only that it does not require officers to present the warrant *prior* to the search. *See Grubbs*, 547 U.S. at — (Souter, J., concurring), *Groh*, 540 U.S. at 562 n. 5. Similarly, as noted above, the Supreme Court has expressly reserved the question of whether the Fourth Amendment requires an officer to present a warrant upon request. *Id.*

Additionally, the majority attempts to distinguish the present case from *Groh* by arguing as follows:

> *Groh* turns on the facial invalidity of the warrant, and not the manner in which the officers conducted the search . . . . [T]he [Supreme] Court indicated that the constitutional violation at issue was the facial insufficiency of the warrant, not the failure to incorporate the affidavit *and* bring it during the search.

(Maj. Op. at 443.) However, the failure to incorporate the affidavit and have it accompany the warrant rendered the warrant in *Groh* facially invalid. Thus, attempting to distinguish between "facial invalidity" and failure to incorporate the affidavit and have it present at the search makes no sense.

The majority also makes much of the fact that a "neutral magistrate" signed the warrant after reading the affidavit. This

is entirely beside the point. In addition to satisfying only one purpose of the particularity clause, as discussed above, this argument ignores the fact that the Constitution not only requires a neutral magistrate's determination on probable cause, but prescribes the manner in which we insure that this requirement is met by requiring the neutral magistrate to list, on the face of warrant, the items to be seized. *See* U.S. Const. amend. IV. This Court is not free to relieve the magistrate of that constitutional obligation simply because it believes another method is equally adequate.

Finally, the majority inexplicably and repeatedly quotes *Dalia v. United States,* 441 U.S. 238 (1979), for the proposition that "a search conducted in accordance with a valid warrant does not become warrantless, and therefore 'presumptively unreasonable,' due to the manner in which the officers conducted the search." (Maj. Op. at 441.) The argument is wholly specious. No one is contending that the search in this case was unreasonable because of the manner in which the search was conducted, unless one construes that manner as pursuant to an invalid warrant. The warrant in this case was facially invalid. It did not state the items to be seized. Nor was it cured by proper incorporation and accompaniment. Therefore, the search violated the Fourth Amendment.

In reaching the opposite conclusion, the majority loses sight of the fact that Defendants in this case could have easily avoided this entire suit and its attendant problems simply by transcribing the items listed in the affidavit onto the warrant or onto a list attached to the warrant. Because Defendants failed to complete this simple task, Plaintiffs were forced to move a federal court to unseal the affidavit, and consequently, did not

receive a copy of the affidavit until one and a half years after the search occurred because the district court in this case would not unseal the affidavit until after Plaintiff Baranski was convicted. This Court would hardly be imposing any great burden on law enforcement officers by holding that the Defendants' conduct violated the Fourth Amendment. Such a holding would, however, go a long way in assuring the American people that they live in a country governed by the rule of law.

B. Clearly Established Right

Not only does the Supreme Court's decision in *Groh* compel the conclusion that Defendants violated Plaintiffs' Fourth Amendment rights, but *Groh* also requires this Court to deny Defendants qualified immunity for the violation. After the Supreme Court determined that the officers in *Groh* violated the particularity clause of the Fourth Amendment, the Court further held that the officer in charge of the search was not entitled to qualified immunity. Applying the qualified immunity test set forth in *Saucier v. Katz,* 533 U.S. at 194, the Supreme Court held that the defendant was not entitled to qualified immunity because the right at issue-the right to be searched only pursuant to a warrant describing with particularity the items to be seized-was clearly established. The right was clearly established because it is set forth in the text of the Constitution itself. Thus the Court reasoned "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Groh,* 540 U.S. at 563 (citing *Saucier,* 533 U.S. at 194).

The very same clearly established constitutional right is at issue in this case. That is, Defendants in this case also violated Plaintiffs' Fourth Amendment right to be searched only pursuant to a warrant describing with particularity the items to be seized. Here too, a reasonable officer would have recognized that his conduct was unlawful because, as in *Groh*, the warrant was deficient on its face. The warrant utterly failed to describe any items that the officers intended to seize. Instead, it referred the reader to an affidavit that the executing officer intentionally had placed under seal. Because the executing officer himself had the affidavit placed under seal, he must have known that the affidavit was not attached to the warrant or available at the scene of the search. Moreover, any reading of the warrant would necessarily draw attention to the fact that no affidavit describing the items to be seized was attached. Thus, any officer who read the warrant would be forced to recognize that the warrant at the scene did not contain any description of the items to be seized and that the warrant was therefore deficient.

Even assuming the facial invalidity of the warrant in this case was somehow less glaring than the deficiency in *Groh*, Defendants are still not entitled to qualified immunity. A defendant is not entitled to qualified immunity simply because the official action in question has not previously been declared unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). A defendant will also be denied qualified immunity if "in light of pre-existing law the unlawfulness [of the conduct is] apparent." *Id.*; *see also Wilson v. Layne*, 526 U.S. 603, 615 (1999) (quoting *Anderson*). *Groh* makes it indisputably clear that pre-existing law rendered the unlawfulness of Defendants' actions apparent. According to *Groh*, one purpose of the

particularity requirement is to inform the individual whose person or property is being searched of the limits of the executing officer's authority. *Groh,* 540 U.S. at 561-62. Moreover, *Groh* recognized that this purpose is clearly established in Supreme Court case law, stating: "[the Supreme Court has] long held . . . that the purpose of the particularity requirement is not limited to the prevention of general searches. A particular warrant also 'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'"[2] *Id.* at 561 (quoting *United States v. Chadwick,* 433 U.S. 1, 9 (1977), *abrogated on other grounds, California v. Acevedo,* 500 U.S. 565 (1991)). Because existing Supreme Court case law made clear that a purpose of the warrant requirement is to inform the individual subject of the search of the limits of the officer's authority, a reasonable officer would recognize the necessity of providing the individual with a warrant listing the items to be seized.

In light of *Groh*'saffirmation of the clearly established nature of the right at issue in this case, Defendant's reliance on this Circuit's pre- *Groh* case law is unavailing. Prior to *Groh,* the law of this Circuit admitted an exception to the general rule that to be properly incorporated an affidavit must be attached

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[2] To the extent *Grubbs* could be interpreted as questioning this rationale, it is inapplicable to our qualified immunity analysis because it was not decided until several years after the search in question occurred. Unlike *Groh,* the year in which *Grubbs* was decided is dispositive of its applicability to the facts of this case because *Grubbs* does not purport to apply "clearly established" law of 2001 but rather the law of 2005. *Groh* in contrast contains a qualified immunity analysis and thus applied law clearly established at the time of the search.

to the warrant or present at the scene: where the officer who drafted the affidavit also executed the search, the affidavit did not need to be attached or present. See *United States* v. *Brown*, 49 F.3d 1162 (6th Cir.1995). *Groh* has overruled this exception, however, both for the purposes of the constitutionality of the search and the officer's entitlement to qualified immunity. As discussed above, the officer in *Groh* both drafted the affidavit and executed the search. Nonetheless, the Supreme Court made clear that the affidavit was not properly incorporated because the warrant contained no words of incorporation and the affidavit was neither attached to the warrant nor present at the scene of the search. Moreover, *Groh* held not only that the affidavit must be attached to the warrant or present at the scene, but that failure to do so violated a clearly established constitutional right. The *Groh* court reached this decision by holding both that the right to a particular warrant was clearly established and that the basis for the right-informing an individual of the officer's lawful authority and limits of the search-was clearly established. Inasmuch as the *Groh* search occurred in 1997, it follows that *Groh* applies to all searches occurring after 1997. The search in this case occurred in 2001, and it therefore follows that it is governed by *Groh* and not *pre-Groh* circuit case law. Consequently, I would hold that Defendants are not entitled to qualified immunity.

III.

Defendants argue that even if they are not entitled to qualified immunity, that the doctrine enunciated in *Heck* v. *Humphrey*, 512 U.S. at 480, requires this Court to dismiss Plaintiffs' Fourth Amendment claims because a finding in favor of Plaintiffs would necessarily imply the invalidity of Plaintiff

Baranski's conviction for conspiracy and his corresponding sentence. Plaintiff Baranski was convicted in federal district court of conspiring to import machine guns in violation 26 U.S.C. § 5861(1). As a part of his sentence, the district court entered an order, requiring Baranski to forfeit the illegally imported machine guns, which were being stored at Plaintiff Pars' warehouse. According to Defendants, a finding that the search in this case was illegal would necessarily imply that Baranski's conviction and sentence are invalid because evidence in the search was used to convict Baranski and later confiscated as a part of his sentence. Contrary to Defendants' contentions, a finding in favor of Plaintiffs on their Fourth Amendment claims would not necessarily imply the invalidity of Baranski's conviction. Thus, I would not dismiss Plaintiffs' claims pursuant to *Heck* v. *Humphrey*, 512 U.S. at 480.

In *Heck* v. *Humphrey*, the Supreme Court held that habeas actions, and not § 1983 actions, were the appropriate vehicle for challenging the lawfulness of criminal judgments. 512 U.S. at 480-89. Accordingly, the Court concluded that claims for relief which "necessarily imply the invalidity of [a] conviction or sentence" are not cognizable under § 1983. *Id.* at 487. The Court made sure to clarify, however, that not all Fourth Amendment claims challenging a search that produced evidence introduced in criminal proceedings "necessarily imply the invalidity of [a] conviction." *Id.* The Court explained:

> [A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding

> conviction. Because of doctrines like independent source and inevitable discovery, see *Murray* v. *United States*, 487 U.S. 533, 539 (1988), and especially harmless error, see *Arizona* v. *Fulminante*, 499 U.S. 279, 307-308 (1991), such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.

Id. at 487 n. 7 (emphasis in original). *Heck* 's litigation bar applies with equal force to *Bivens* actions. *Robinson* v. *Jones*, 142 F.3d 905, 906-07 (6th Cir.1998).

A hypothetical judgment in this litigation that the search of Pars' warehouse and the seizure of Baranski's machine guns was unconstitutional would not "necessarily imply" the invalidity of Baranski's criminal conviction for conspiracy to illegally import machine guns. The district court in Baranski's criminal case denied the motion to suppress the machine guns, but indicated that it did not "necessarily believe" that the machine guns were even relevant to the case. On appeal, the Eighth Circuit held that "[t]he warrant should not have been suppressed for lack of particularity" because "the warrant referred to a sealed affidavit that described the weapons," *Baranski*, 75 Fed.Appx. at 568 (citing *United States* v. *Cherna*, 184 F.3d 403, 412-14 (5th Cir.1999)), but added that even if the weapons should have been suppressed, their admission was harmless error because the documents and testimony proved the government's case. *Id.* Consequently, a judgment in this case that the search and seizure was unconstitutional would not necessarily imply the invalidity of Baranski's conviction. *Cf. Heck*, 512 U.S. at 487 n. 7 (opining that "a suit for damages

attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction . . . [b]ecause of doctrines like . . . harmless error[.]") (citations omitted).

The analysis does not end here, however, because *Heck* also requires dismissal of a lawsuit that would necessarily imply the invalidity of Baranski's sentence or "any outstanding criminal judgment" against him. *Heck*, 512 U.S. at 487. The district court entered an order of criminal forfeiture pursuant to the procedures set forth at 21 U.S.C. § 853 after finding that the guns and accessories described in the indictment were property used or intended to be used in a manner to facilitate the commission of the crime for which defendant was convicted. See 26 U.S.C. § 5872(a) (providing that "[a]ny firearm involved in any violation of the provisions of this chapter shall be subject to seizure and forfeiture"); 28 U.S.C. § 2461(c) (providing that where forfeiture of property is authorized by statute but no specific statutory provision is made for criminal forfeiture upon conviction, the government may include the forfeiture in the indictment and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in 21 U.S.C. § 853); 21 U.S.C. § 853 (providing that the court, "in imposing sentence, shall order criminal forfeiture as to, *inter alia*, property used or intended to facilitate the commission of a crime). The Eighth Circuit affirmed the forfeiture order, holding that the evidence supported the district court's finding that the weapons were intended to be used to commit or facilitate the commission of the charged crime. *Baranski*, 75 Fed.Appx. at 569 (citing 21 U.S.C. § 853(a)(2)).

Because "[f]orfeiture is an element of the sentence imposed following conviction," *Libretti* v. *United States*, 516 U.S. 29, 38-39 (1995) (emphasis omitted) (interpreting 21 U.S.C. § 853(a)),[3] Baranski seeks to impugn part of his criminal sentence by obtaining an injunction compelling the return of seized firearms, in direct contravention of the forfeiture order. Accordingly, *Heck* bars Baranski's *Bivens* claim to the extent he seeks return of the forfeited machine guns.

Baranski seeks more than just return of the weapons. His complaint requests damages resulting from the fact that the government's seizure of the weapons placed him "in an economically disadvantaged position in relation to his competitors who are directly benefitting from the actions of the defendants, and the absence of [Baranski] from the marketplace." (J.A. 22 (Complaint at ¶ 73)); see also *id.* ("The taking [of Baranski's machine guns in violation of the Fourth Amendment], has . . . impaired plaintiffs' ability to earn a lawful income from legitimate activities for which they have been licensed and authorized by the United States Treasury."); *id.* at 35 (prayer for relief at ¶ 5) (seeking general damages of $186,100). He also seeks compensatory damages for, inter alia, impairment of reputation and mental anguish, as well as punitive damages. See *id.* at 35 (prayer for relief at ¶ 7) (seeking compensatory damages for impairment of reputation, mental anguish, lost business opportunity as a result of Defendants' actions, and loss of use of property); *id.* (prayer for

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[3] See also FED. R. CRIM. P. 32.2(b)(3) ("At sentencing . . . the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment.").

relief at ¶ 9) (seeking punitive damages for constitutional violations).

Heck bars Baranski's *Bivens* claim to the extent he seeks damages for the lost economic value of the weapons, whether measured in terms of their appraised value at the time of the unlawful seizure or the potential value Baranski could have received for the weapons had he been able to sell them on the open market at some future time. An award of such damages would directly contravene the forfeiture order, which is premised on the assumption that Baranski no longer has proper title to, and therefore no continuing economic interest in, those weapons. The same logic applies to Baranski's claim for damages premised on loss of use of the weapons. Because the forfeiture order determined that Baranski no longer owns the weapons, he cannot seek damages for loss of use of those weapons without running afoul of *Heck*.

Baranski's request for damages for his injured reputation and mental anguish, as well as his request for punitive damages, are different matters entirely. An award of such damages would not necessarily imply the invalidity of the criminal forfeiture order. The government knew about the existence and location of the forfeited weapons prior to their unlawful seizure from Pars' warehouse because Baranski had told ATF Agent Johnson about them during an interview. Defendants could have sought and obtained an order forfeiting those weapons without seizing the weapons. Accordingly, the validity of the forfeiture order is not dependent upon the legality of the government's seizure of those weapons. *Cf. One 1958 Plymouth Sedan* v. *Commonwealth of Pennsylvania*, 380 U.S. 693, 699-703 (1965) (reversing order forfeiting

automobile used to transport untaxed liquor in violation of state law, because search of car potentially violated the Fourth Amendment and the state could not establish an illegal use of the car without using evidence resulting from the allegedly unconstitutional search). It follows that a judgment in this case that Defendants' seizure of the weapons violated Baranski's Fourth Amendment rights would not necessarily imply the validity of the forfeiture order. Further, no *Heck* problem arises, as long as Baranski is limited to recovering damages only for injuries that would not otherwise have arisen from the lawful forfeiture of his weapons. Although he cannot seek the replacement value of the weapons or lost profits due to his dispossession of the weapons, he can seek damages for impaired reputation and mental anguish as well as punitive damages attributable to the means by which Defendants effected the search and seizure. An award of damages for these injuries would not necessarily imply the invalidity of the forfeiture order, the validity of which is entirely independent of the method of the search and seizure.

Although Defendants also raise the *Heck* bar in opposition to Pars' *Bivens* claim, we need not resort to *Heck* to the extent Pars seeks the return of the forfeited machine guns. See J.A. 35 (Complaint, prayer for relief at ¶ 3) (requesting an order compelling the return of the machine guns to Pars' warehouse). Pars was notified of the forfeiture proceedings in Baranski's criminal case, and therefore Pars, as a third party, had the opportunity to assert a legal interest in Baranski's firearms and petition the district court for a hearing to adjudicate the validity of its asserted interest. See FED. R. CRIM. P. 32.2(c)(1); 21 U.S.C. § 853(n)(2). The district court below noted that Pars had filed a claim of ownership in

Baranski's forfeiture proceedings in the Eastern District of Missouri, but there is no information in the Joint Appendix indicating what type of information, if any, Pars submitted to support its claim. Pars could have appealed an adverse decision in the forfeiture proceedings, separate and apart from Baranski's right to appeal his criminal conviction and sentence. *E.g.*, *United States* v. *Harris*, 246 F.3d 566, 567 (6th Cir.2001); see also FED. R. CRIM. P. 32.2(c)(4) ("An ancillary proceeding is not part of sentencing."). There is no indication in the record that Pars ever took such an appeal, and as best as we can tell, the forfeiture order became final, giving the United States clear title to Baranski's firearms. FED. R. CRIM. P. 32.2(c)(2); 28 U.S.C. § 853(n)(7). Thus, Pars' claim for return of the weapons is foreclosed by operation of the forfeiture statute, and Pars cannot now bring a collateral cause of action to again lay claim to Baranski's firearms.

Pars' *Bivens* claim is not limited to a request for the return of the machine guns. Pars' complaint also seeks compensatory and punitive damages directly related to the government's seizure of those weapons. See J.A. 22 (Complaint at ¶ 73) ("The taking [of Baranski's machine guns in violation of the Fourth Amendment], has . . . impaired plaintiffs' ability to earn a lawful income from legitimate activities for which they have been licensed and authorized by the United States Treasury."); *id.* at 35 (prayer for relief at ¶ 5) (seeking general damages of $186,100); *id.* at 35 (prayer for relief at ¶ 7) (seeking compensatory damages for impairment of reputation, lost business opportunity as a result of Defendants' actions, and loss of use of property); *id.* at 35 (prayer for relief at ¶ 9) (seeking punitive damages for constitutional violations). Apart from Pars' asserted ownership interest in Baranski's

firearms, Pars allegedly had contractual interests connected to those weapons as a bailee who expected compensation for storing them in its warehouse. Pars also allegedly had an interest in being free from unlawful governmental intrusions onto its property. Forfeiture proceedings, however, are not designed to compensate claimants for injuries to these types of interests. The forfeiture proceedings connected with Baranski's criminal case could address only the proper disposition of Baranski's firearms. See 26 U.S.C. § 5872(a). Pars would not have been permitted to intervene in those proceedings for any reason other than to stake a claim to those firearms. See 21 U.S.C. § 853(k)(1) (providing that "no party claiming an interest in property subject to forfeiture . . . may . . . intervene in a trial or appeal of a criminal case involving the forfeiture of such property," other than to assert a legal interest in the property subject to forfeiture).

The question is whether *Heck* nevertheless bars Pars' *Bivens* claim for compensatory and punitive damages. *Heck* involved an action under 42 U.S.C. § 1983 against county prosecutors and a state police investigator, seeking damages for their allegedly unconstitutional conduct that led to the plaintiff's conviction. *Heck*, 512 U.S. at 479. The Court held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence[.]" *Id.* at 487 (emphasis added). The Court added that "if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed[.]" *Id.* (emphasis omitted and another emphasis added). The Court expressed particular

concern over affording criminal defendants another opportunity to collaterally attack their criminal convictions. *Id.* at 484-85 ("This Court has long expressed . . . concerns for finality and consistency and has generally declined to expand opportunities for collateral attack [.]") (citations omitted). Pars, however, is not a prisoner or a former prisoner, and a successful litigation would not demonstrate the invalidity of any outstanding criminal judgment against Pars. Thus, nothing in *Heck* contemplates extending the bar against civil damages actions to third parties like Pars, whose prior criminal judgments are not at issue.

Moreover, extending *Heck* to Pars would be fundamentally unfair. As explained above, Defendants searched Pars' warehouse in reliance on a facially defective search warrant, and their reliance was not objectively reasonable. Yet, barring Pars' claim pursuant to *Heck* would leave Pars with effectively no remedy for the unconstitutional intrusion. Although the constitutionality of the search was addressed by the courts of the Eighth Circuit in Baranski's criminal case, Pars had no opportunity to participate in the resolution of that issue.[4] I am unaware of any statutory provision that would have afforded Pars the right to intervene in Baranski's criminal trial in order to join his suppression motion. Even if Pars had been permitted to intervene, its constitutional claims for damages against the individual ATF

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[4] Conceivably, the prejudice to Pars would be even more severe if Baranski's criminal counsel had been ineffective, such as by failing to advance colorable arguments concerning the constitutionality of the search and seizure. Indeed, if Baranski's attorney had failed to contest the search and seizure, the Fourth Amendment issue would not have been litigated at all.

agents could not have been adjudicated in that forum because the agents were not parties to Baranski's criminal proceeding. I also question the efficacy and propriety of trying a criminal action simultaneously with an action for damages. For these reasons, I would also hold that *Heck* does not bar Pars' Bivens claims for damages against Defendants.

As a purely factual matter, Pars' ability to recover damages flowing from the unlawful seizure of the weapons may be greatly circumscribed. The weapons have been forfeited to the government, and that criminal judgment is unassailable. Therefore, to the extent Pars seeks damages for loss of use of the weapons or lost storage costs attributable to their unlawful seizure, Pars' recovery is temporally limited by the inevitable, lawful forfeiture of those weapons. Pars also can seek compensatory damages for alleged injuries to its reputation and any other financial injury that flowed from the unlawful seizure, as long as the injuries can be distinguished from harm it inevitably would have suffered due to the subsequent, lawful forfeiture of Baranski's weapons. Like Baranski, Pars may also seek punitive damages against Defendants for the manner in which they executed the search and seizure. Given the state of the record, I express no opinion as to whether Pars or Baranski ultimately would be able to marshal sufficient evidence to prove a compensable injury or even to create a genuine issue of material fact that they suffered a compensable injury. They may be entitled only to an award of nominal damages for their constitutional injuries. Those are issues that would be best left to the district court to decide on remand.

Finally, I acknowledge that my dissenting opinion on the Fourth Amendment issue appears to be at odds with the Eighth Circuit's holding on the same set of operative facts. Were Plaintiffs to proceed to trial and prevail, Defendants (in their individual capacities) would be found to have flouted the Fourth Amendment, even though they (in their official capacities) previously were found to have acted lawfully. I would note, however, that at the time the Eighth Circuit rendered its decision in Baranski, it did not have the benefit of the Supreme Court's *Groh* decision. In any event, the holding proposed by the dissent in the instant case would be preferable to the alternative of leaving individuals and property owners who have suffered patently unconstitutional intrusions without any remedy. I would therefore hold that an action for damages, as circumscribed above, would not necessarily demonstrate the invalidity of any criminal judgment and, consequently, is not barred by *Heck*.

IV.

For all the foregoing reasons, I would reverse the district court's dismissal of Plaintiffs' *Bivens* claims on qualified immunity grounds; affirm the dismissal of Plaintiffs' *Bivens* claims to the extent they seek (a) return of the firearms that were forfeited after Baranski's criminal conviction or (b) damages attributable to the inevitable, lawful forfeiture of those firearms; and reverse the order of dismissal with respect to Plaintiffs' claims for compensatory damages that arose from Defendants' unlawful search and seizure, but that were not otherwise an inevitable result of the subsequent forfeiture. I would also reverse the dismissal of Plaintiffs' claims for punitive damages.

Supreme Court, U.S.
FILED
SEP 29 2006
OFFICE OF THE CLERK

No. 06-612

IN THE

Supreme Court of the United States

KEITH B. BARANSKI,

Petitioner,

v.

FIFTEEN UNKNOWN AGENTS OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:01CV-398-H

KEITH B. BARANSKI, et al., PLAINTIFFS

V.

FIFTEEN UNKNOWN AGENTS
OF ATF, et al., DEFENDANTS

MEMORANDUM OPINION

Defendants are agents of the Bureau of Alcohol, Tobacco and Firearms ("BATF") who were involved in the search and seizure operation. Plaintiff, Keith B. Baranski, imported the machine guns which the agents seized. Plaintiff Pars International Corporation operated the Customs Bonded Warehouse in Louisville, Kentucky which stored the machine guns. Their complaint alleges that Defendants obtained an unlawful warrant and then violated Plaintiffs' rights by seizing 372 machine guns in the warehouse which Pars operated. As a result of the seizures, Baranski was indicted by a federal grand jury and convicted on conspiracy charges. The machine guns were forfeited as the product of criminal acts. In the process, a federal judge denied Baranski's motion to suppress the machine guns as the product of an unlawful search.

This case has been the subject of previous motions. On

March 22, 2002, this Court issued a comprehensive Memorandum Opinion and among other things, the Court stayed the civil action pending resolution of the criminal charges. [1] On November 22, 2002, the Court lifted the stay on civil proceedings. At that time, only three civil claims remained. Plaintiffs sought to unseal the affidavit used to support the search warrant. This issue is now moot.[2] Plaintiffs' other claims are for violation of their Fourth and Fifth Amendment rights. They have moved to dismiss the remaining allegations of the complaint on various grounds of qualified immunity. The Court will now consider each of these claims.

I.

For purposes of reviewing qualified immunity, the Court must consider in a manner most favorable to Plaintiff all those facts material to that issue.

After a six month investigation BATF agents sought a warrant to search Plaintiffs' premises. On April 10, 2001, Magistrate Judge Gambill issued a warrant for seizure. The affidavit supporting the warrant and identifying the machine guns for seizure was executed by one of the individually named BATF agents, Special Agent Michael Johnson. The affidavit

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[1] That Memorandum Opinion also (1) substituted the United States as the sole defendant as to Plaintiffs' state law tort claims; (2) dismissed those state law claims against the United States as not being presented under the FTCA; (3) denied the United States request to dismiss Count One which requested unsealing of the affidavit; and (4) dismissed Plaintiffs' claims for return of the property.

[2] FN2. In its November 22, 2002, order, the Court unsealed the affidavit supporting the search warrant.

recited that Baranski had imported machine guns to be sold as part of a scheme involving fraudulent demonstration letters, that is, letters from a Sheriff in Missouri requesting demonstrations of machine guns for law enforcement purposes. Judge Gambill sealed the affidavit after issuance of the warrant. Defendants searched the warehouse, seizing 372 machine guns as well as other items. The return of the warrant, executed on April 11, 2001, one day after the machine guns were seized, contains the inventory of the property seized. It also shows that a receipt for the inventory was provided to Saied Shafizadeh, a principal of Plaintiff Pars International.

On July 3, 2002, the Grand Jury of the Eastern District of Missouri returned an indictment against Baranski. The indictment charged Baranski with conspiring to violate federal firearms laws by submitting false records and sought forfeiture of the machine guns. Baranski moved to suppress evidence of the machine guns on the grounds that their seizure was unconstitutional, but the federal court overruled this motion and found the seizure constitutional. Baranski's criminal trial commenced on November 12, 2002, and concluded with the jury's return of a guilty verdict on November 18, 2002. Thereafter, Judge Charles Shaw sentenced Baranski to the custody of the Bureau of Prisons for 60 months. Moreover, in a written opinion, Judge Shaw found that the 372 machine guns were property used to facilitate the crimes for which Baranski was convicted and, therefore, were ordered forfeited.

II.

In Count Three, Subsection (a) of the complaint, Plaintiffs allege that the BATF seizure of the machine guns belonging to Baranski and stored at Pars International was

made pursuant to an invalid warrant and, therefore, violates their Fourth Amendment rights. Plaintiffs allege that the warrant was invalid because the description of property to be seized was contained in an affidavit that Magistrate Gambill ordered sealed and that any other description was not specific enough. Therefore, Defendants could not show Plaintiffs a list of the items to be seized.

In *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), the Supreme Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." The standard to be applied in deciding a claim of qualified immunity is one of "objective reasonableness." *Id.* The Court reiterated both the rule and the standard in *Davis v. Scherer*, 468 U.S. 183, 191 (1984), and added that "[n]o other 'circumstances' are relevant to the issue of qualified immunity." *Id.* Further refining the scope of inquiry to be conducted by a court in deciding a claim of qualified immunity, the Supreme Court cautioned in *Anderson v. Creighton*, 483 U.S. 635 (1987), against identifying a clearly established rule of law at a level of broad generality. Rather, the right allegedly violated must have been clearly established in a "more particularized, and hence more relevant, sense." *Id.* at 639-640.

A.

The Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons

or things to be seized." The constitutional issue presented here is whether the particularity requirement of the Fourth Amendment was violated by the execution of a warrant with a sealed affidavit that described the property to be seized.

Neither the Supreme Court nor the Sixth Circuit Court of Appeals has addressed this precise issue. The Sixth Circuit has, however, held that a person whose property is seized need not be served with a warrant attachment that describes that property. *Frisby v. United States*, 79 F.3d 29, 31-32 (6th Cir.1996). In *Frisby*, the plaintiff made a motion pursuant to Fed.R.Crim.P. 41(e) for the return of property he claimed was unlawfully seized. He complained that in seizing his papers, IRS agents acted pursuant to a warrant which contained no description of the property to be seized but instead incorporated an "Attachment A" which described the property. The warrant itself was provided to the plaintiff prior to the search, but not Attachment A. The agents provided the plaintiff with an inventory of the property seized before leaving the premises. The Sixth Circuit acknowledged that the agents in *Frisby* had not complied with Fed.R.Crim.P. 41(d), which requires that officers "taking property under warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken." 79 F.3d at 32. Though the court declared that "the procedural steps enumerated in Rule 41(d) are important," it characterized those steps as "ministerial" and held that noncompliance with these procedures is not a violation of the Fourth Amendment. *Id.* In particular, the court found that the plaintiff was not prejudiced because he received an inventory of items seized and because the agents seized no more than permitted by Attachment A. *Id.*

For all material purposes, the circumstances in this case are equivalent to those found acceptable in *Frisby*. As in *Frisby*, Plaintiffs here suffered no prejudice. Pars International, the bailee of Baranski's machine guns, was provided with the warrant, though not with the attachment-in this case the sealed affidavit-that described the items to be seized. As in *Frisby*, Pars International was provided with an inventory of the 372 machine guns and assorted parts that were seized. Thus, as in *Frisby*, the procedural requirements of Rule 41(d) arguably were not strictly followed. However, following the same analysis, it appears as though no Fourth Amendment violation occurred.

B.

The more important question for qualified immunity purposes is whether Plaintiff can show violation of a clearly established constitutional right in these circumstances. Based on the analysis contained in Section III(A), Plaintiff's rights to an unsealed affidavit may be debatable, but certainly not clearly established. Nor can the Court find that reasonably prudent federal official could believe that he had violated a constitutional right. Defendants are shielded from liability and suit so long as their conduct does not violate a clearly established constitutional right. *Harlow*, 457 U.S. at 818. Case law from circuits other than that in which the warrant was issued are particularly relevant to the Court's inquiry. The Sixth Circuit case law is certainly far from clear that an officer should not execute a warrant where the affidavit supporting it has been sealed. While one may try to distinguish *Frisby* and Plaintiffs certainly have; a reasonably prudent law enforcement officer would believe that it enables the actions taken here.

In addition, the search warrant and the sealing of the affidavit were each approved by a United States Magistrate Judge. This provides even more reason for a prudent and careful official to believe that his actions were proper. Even if the Magistrate Judge was mistaken in sealing the affidavit, Defendants were entitled to their reasonable belief that the search warrant was validly issued.

C.

One final issue deserves discussion. Plaintiffs argue that their Fourth Amendment *Bivens* claim is supported by evidence that Defendants violated provisions of 18 U.S.C. § 1924(d) which imposes restrictions on the seizure and forfeiture of firearms. The Court finds a number of conceptual problems with this argument.

First, in *Bivens* v. *Six Unknown Named Agents, et al.*, 403 U.S. 388 (1971), the Supreme Court authorized claims against federal officials acting under color of federal authority for violations of constitutional rights. *Bivens* does not provide a basis for claims against federal officials for violating a federal statute. Therefore, Plaintiffs' only *Bivens* claims against Defendants is for violation of their Fourth Amendment rights. Second, Plaintiffs may be arguing that they may somehow incorporate the provisions of 18 U.S.C. § 924(d) into the application of the Fourth Amendment as it applies to the seizure of firearms. It goes without saying that a federal statute may not create more restrictive constitutional rights upon official behavior than the constitutional amendments themselves. Thus, Plaintiffs cannot use a federal statute as a vehicle for alleging a constitutional claim under *Bivens*.

Finally, Plaintiffs' complaint in Count III(a) asserts a claim for violation of their Fourth Amendment rights. In the complaint, Plaintiffs do not make a direct claim for violation of 18 U.S.C. § 924(d). Therefore, to the extent Plaintiffs now assert a claim under that federal statute, such a claim is outside the complaint. In any event, it is certainly unclear whether the statute applies in these circumstances. Even if it did apply in these circumstances, it is unclear whether Plaintiffs could predicate a private right of action under the statute. *See Cort v. Ash*, 422 U.S. 66, 78 (1975). Regardless, Plaintiffs did not assert such a claim in their complaint.

Defendants are entitled, therefore, to qualified immunity on this claim.

III.

In Count Three, Subsection (b) of the complaint Plaintiffs allege that the seizure of machine guns belonging to Baranski and stored at Pars International violated Baranski's due process rights under the Fifth Amendment due to the absence of notice or hearing. The Court can find no basis for such a claim.

The Supreme Court has determined that there is no requirement for an adversary hearing prior to a seizure of possessions under a criminal search warrant. *Fuentes v. Shevin*, 407 U.S. 67, 93 n. 30 (1972). Even in the context of a civil forfeiture there would be no need to provide prior notice as the goods seized were easily movable personal property. *See United States v. Any & All Radio Station Equip.*, 218 F.3d 543, 550 (6th Cir.2000). It is well settled that forfeitures of property

used in violation of law is generally not a denial of due process of law or a violation of the constitutional prohibition against the taking of private property for public use without fair compensation. *Van Oster v. State of Kansas*, 272 U.S. 465, 467 (1926); *Goldsmith, Jr.-Grant Company v. U.S.*, 254 U.S. 505 (1921); *Dobbins' Distillery v. U.S.*, 96 U.S. 395, 6 Otto 395, 24 L.Ed. 637 (1877). Consequently, there appears to be no basis upon which Plaintiffs might claim a violation of their Fifth Amendment rights.

IV.

The foregoing analysis makes clear that Plaintiffs have no basis for a civil *Bivens* action for violation of either Plaintiffs' Fourth or Fifth Amendment rights. Nevertheless, one final issue deserves comment.

A federal judge and jury have already found Baranski guilty of federal conspiracy charges and have forfeited the machine guns at issue. In particular, a magistrate judge concluded that even though the warrant may have lacked specificity, the good faith exception applied, that is that the ATF agents had good reason to believe that the warrant was valid. To find that Plaintiffs had grounds to pursue their *Bivens* actions, this Court would need to completely ignore the Magistrate Judge's findings. To do so would require the Court to call into question Defendants' justified reliance upon Magistrate Gambill's issuance of the warrant and sealing of the affidavit. To allow this case to go forward would require this Court to call into question one underlying premise of the federal criminal conviction. To allow the case to go forward seems entirely inconsistent with a federal judge's decision to forfeit

these machine guns as being used in the commission of a federal conspiracy crime.

To do all of this would seriously undermine the credibility of Baranski's criminal conviction and the accompanying proceedings. The Court should not do so on these facts. *Heck v. Humphrey*, 512 U.S. 477 (1994). It amounts to a collateral attack on Baranski's conviction and the various court rulings which led to it. Once again, the Court should not allow such an attack in these circumstances. *See Huey v. Stine*, 230 F.3d 226, 229-230 (6th Cir.2000).

The Court will enter an order consistent with this Memorandum Opinion.

s/John G. Heyburn II
John G. Heyburn II
Chief Judge, U.S. District Court

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:01CV-398-H

KEITH B. BARANSKI, et al., PLAINTIFFS

V.

FIFTEEN UNKNOWN AGENTS
OF ATF, et al., DEFENDANTS

ORDER

The United States and the named individual Defendants have moved to dismiss with prejudice all remaining claims in this action. Having issued a Memorandum Opinion and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the motion to dismiss is SUSTAINED and all remaining claims of the complaint are DISMISSED WITH PREJUDICE.

This is a final and appealable and there is no just reason for delay.

This 14th day of March, 2003.

s/John G. Heyborn II
John G. Heyborn II
Chief Judge, U.S. District Court

cc: Counsel of Record

FILED
FEB 23 2007
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SUPREME COURT, U.S.

No. 06-612

In the Supreme Court of the United States

KEITH B. BARANSKI, PETITIONER

v.

FIFTEEN UNKNOWN AGENTS OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether federal agents are subject to suit under the Fourth Amendment and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), when they conducted a warrant search in accordance with a description of the items to be seized that was included in an affidavit reviewed by the magistrate and expressly incorporated in the warrant, but the affidavit did not accompany the warrant at the time of the search.

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In the Supreme Court of the United States

No. 06-612

KEITH B. BARANSKI, PETITIONER

v.

FIFTEEN UNKNOWN AGENTS
OF THE BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-62a) is reported at 452 F.3d 433. The panel opinion of the court of appeals is reported at 401 F.3d 419. The memorandum opinion of the district court granting respondents' motion to dismiss (Pet. Supp. App. 1a-10a) is reported at 252 F. Supp. 2d 401.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2006. The petition for a writ of certiorari was filed on September 29, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

As is relevant here, petitioner brought suit in the United States District Court for the Western District of Kentucky against the federal respondents, six named and fifteen unnamed agents of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that the agents violated his Fourth Amendment rights by seizing his guns and other items. The district court granted the federal respondents' motion to dismiss on grounds of qualified immunity. Pet. Supp. App. 1a-10a. A panel of the court of appeals initially reversed in relevant part. 401 F.3d 419 (6th Cir. 2005). After granting rehearing en banc, the court of appeals affirmed. Pet. App. 1a-62a.

1. Petitioner was a licensed firearms dealer who imported guns from Eastern European countries. Petitioner stored the guns in a customs warehouse in Louisville, Kentucky, until he could sell them to eligible law enforcement agencies. ATF agents discovered that petitioner was using forged letters from a law enforcement official in order to sell the guns to other parties. On April 20, 2001, after a six-month investigation, ATF Agent Michael Johnson applied to a magistrate for a warrant to search the Louisville warehouse. In the location on the warrant form for describing the items to be seized, the warrant form stated, "See Attached Affidavit." An attached affidavit listed the items to be seized: *viz.*, "about 425" guns owned by petitioner and stored at the warehouse. The magistrate issued the warrant, signing both the draft warrant and the affidavit, but ordered the affidavit to be sealed in order to protect ATF's confidential sources. Pet. App. 3a-4a.

The following day, Agent Johnson and approximately 20 other ATF agents executed the warrant. Upon reaching the warehouse, the agents were met by the warehouse's manager, who asked to see the warrant. After reading the warrant, the manager asked to see the affidavit. The agents informed the manager that the affidavit was under seal, but told him that they were looking for guns owned by petitioner and stored at the warehouse. The manager (who was also an attorney) insisted that the warrant was defective because it did not describe the items to be seized, but permitted the agents into the warehouse (and directed the agents to the area in which petitioner's guns were stored). The agents seized 372 machine guns and 12 crates containing gun accessories. Upon leaving the warehouse, the agents gave the manager a copy of the search warrant and an inventory of the seized items. Pet. App. 4a-5a.

2. As is relevant here, petitioner brought a *Bivens* action in the Western District of Kentucky against the federal respondents, alleging that they violated his Fourth Amendment rights because the affidavit listing the items to be seized did not accompany the warrant at the time of the search. Pet. App. 5a. The district court denied petitioner's motion to unseal the affidavit and stayed the action pending the completion of criminal proceedings against petitioner. *Ibid.* Petitioner was subsequently convicted in the Eastern District of Missouri of conspiring to import machine guns by making knowingly false entries on applications and other records, in violation of 26 U.S.C. 5861(*l*), and sentenced to 60 months of imprisonment. Pet. App. 5a-6a. The Eighth Circuit affirmed, 75 Fed. Appx. 566 (2003), and this Court denied certiorari, 541 U.S. 1011 (2004). Both lower courts held that the seized items should not be

suppressed; the Eighth Circuit reasoned that "[t]he warrant should not have been suppressed for lack of particularity" because "the warrant referred to a sealed affidavit that described the weapons." 75 Fed. Appx. at 568.

3. After petitioner was convicted in the criminal proceedings, the district court unsealed the affidavit and lifted the stay. The federal respondents then moved to dismiss petitioner's Fourth Amendment claim on grounds of qualified immunity. The district court granted the motion to dismiss. Pet. Supp. App. 1a-10a. The court reasoned that "it appears as though no Fourth Amendment violation occurred," *id.* at 6a, and that, even if it had, the agents were entitled to qualified immunity on the ground that the Sixth Circuit's case law on the issue was "certainly far from clear." *Ibid.*[1]

4. A panel of the court of appeals initially reversed in relevant part. 401 F.3d 419 (2005). After granting rehearing en banc, however, the court of appeals affirmed. Pet. App. 1a-62a.

a. The en banc court of appeals first held that the ATF agents' conduct did not violate the Fourth Amendment. Pet. App. 7a-26a. At the outset, the court reasoned that the warrant complied with the Warrant Clause, despite the fact that the warrant itself did not describe with particularity the things to be seized, because it expressly incorporated an affidavit that did describe them. *Id.* at 9a-10a. The court explained that this case was therefore distinguishable from *Groh* v. *Ramirez*, 540 U.S. 551 (2004), because, in this case, "[the] warrant explicitly incorporated the supporting

[1] The district court held in the alternative that petitioner's *Bivens* action "amount[ed] to a collateral attack on [petitioner's] conviction and the various court rulings which led to it" and was therefore barred under *Heck* v. *Humphrey*, 512 U.S. 477 (1994). Pet. App. 10a.

affidavit; the magistrate signed the affidavit and warrant; and the affidavit described with particularity the items to be seized." Pet. App. 11a. Accordingly, "this warrant made it clear that the magistrate understood and cabined the scope of the search he was authorizing." *Ibid.* The court noted that, by its terms, the requirements of the Warrant Clause need only be satisfied upon "issu[ance]" of the warrant. *Id.* at 13a. "Consistent with the language of the Warrant Clause and the historical purposes behind it," the court continued, "a search conducted in accordance with a valid warrant does not become warrantless, and therefore 'presumptively unreasonable,' due to the manner in which the officers conducted the search." *Id.* at 14a.

The court of appeals considered, and rejected, petitioner's contention that this Court's decision in *Groh* "establishes an incorporate-and-produce and an incorporate-and-accompany requirement with respect to supporting affidavits," under which "the affidavit also (1) must be given to an occupant who requests it at the outset of the search, (2) must accompany the agents during the search and (3) must be left at the scene of the search." Pet. App. 15a-16a.

As to the "incorporate-and-produce" argument, the court of appeals reasoned that *Groh* provided "scant support" for that argument, because "[t]he Court acknowledged that the Fourth Amendment does not compel officers to present a warrant before a search." Pet. App. 16a. At most, the court of appeals explained, "the Court left open only the possibility that it would be 'unreasonable' to decline such a request, not that the search would become warrantless if the agents decline such a request." *Ibid.* The court of appeals added that, in the wake of this Court's subsequent decision in *United*

States v. *Grubbs*, 126 S. Ct. 1494 (2006), "the possibility that the Warrant Clause requires officers to produce a copy of the warrant (and any affidavit) at the outset of the search seems even less plausible." Pet. App. 16a. The court of appeals noted that, in any event, such a rule would not "lend itself to sensible application," because "there doubtless will be times when officers could not reasonably be expected to comply with such a requirement." *Id.* at 17a.

As to the "incorporate-and-accompany" argument, the court of appeals acknowledged that *Groh* "contain[ed] some language in support of [that] argument." Pet. App. 17a. Insofar as *Groh* "refer[red] to an incorporated affidavit being 'present' at the search," however, the court suggested that one possible explanation was that "the reasoning of *Groh* (though perhaps not the result) might well have been different if the facially defective warrant had been attached to an affidavit signed by the magistrate that clearly corrected the omission and that accompanied the warrant during the search." *Id.* at 18a-19a. "Another possibility," the court hypothesized, "is that the Court was suggesting that officers generally should bring an incorporated affidavit * * * with them during the search and that the failure to do so may be a factor in determining whether the search was reasonable, two points with which we agree." *Id.* at 19a.

As to the "incorporate-and-leave-behind" argument, the court of appeals reasoned that, "[i]n some settings, such an unyielding requirement would make little sense." Pet. App. 19a. The court contended that *Groh* "never said that the failure to leave an incorporated affidavit (or authenticated summary) at the scene of the search renders the search presumptively unreasonable." *Id.* at 20a.

The court of appeals next concluded that the agents did not violate the Reasonableness Clause when they conducted the search without the accompanying affidavit. Pet. App. 21a-26a. At the outset, the court noted that, "[t]o satisfy the Reasonableness Clause, officers not only must obtain a valid warrant[,] but they also must conduct the search in a reasonable manner." *Id.* at 21a. Considering the totality of the circumstances, the court then determined that the search was reasonable. *Id.* at 22a. The court reasoned that, although Agent Johnson did not show the affidavit to the manager, he "proceeded to tell him orally what the warrant and affidavit authorized them to seize." *Id.* at 23a. The court added that "[t]here was nothing unduly complex about the object of the search that would have prevented agent Johnson from remembering precisely what he had authority to search for and to seize." *Ibid.* Moreover, the court observed, "[t]he record * * * shows that once [the manager] agreed to let the agents into the warehouse, the agents conducted the search in a reasonable manner." *Ibid.* While the court suggested that "the agents would have been wiser to bring a written summary of the items to be seized (presumably signed by the magistrate) or to list the items to be seized in the warrant itself," it concluded that no constitutional violation had occurred. *Id.* at 26a.

The court of appeals held in the alternative that, even if the search did violate the Fourth Amendment, the ATF agents were entitled to qualified immunity because the search "did not violate clearly established law." Pet. App. 26a (internal quotation marks omitted). The court noted that the Eighth Circuit had held (in petitioner's appeal from his criminal conviction) that the agents had "acted in good faith in executing *this* war-

rant," *id.* at 27a; that "the prevailing law in *this* circuit would have led reasonable agents to believe that their conduct was legal at the time they conducted the search," *ibid.*; and that "other appellate courts have rejected similar claims either because they did not state a constitutional violation or because they did not defeat a * * * good-faith defense." *Id.* at 28a. The court of appeals recognized that the Ninth Circuit had held that "an affidavit necessary to satisfy the particularity requirement not only must be incorporated into the warrant but also must accompany the warrant at the scene." *Id.* at 30a (citing *United States* v. *McGrew*, 122 F.3d 847 (1997)). The court concluded, however, that "this disagreement among the circuits at the time of the search * * * shows that the agents did not violate clearly established law." *Ibid.*

Finally, the court of appeals reasoned that this Court's decision in *Groh* "does not alter th[at] conclusion." Pet. App. 30a. Although the Court in *Groh* held that the agent in that case was not entitled to qualified immunity because the warrant at issue contained a "glaring deficiency," *ibid.* (quoting 540 U.S. at 564), the court of appeals reasoned that "[t]oday's facts offer a poor analogy," because, "[f]ar from invalidating incorporated affidavits, *Groh* recognized that they may satisfy the particularity requirement." *Id.* at 31a. According to the court of appeals, "[n]or did *Groh* say that it was clearly established that a warrant valid upon issuance becomes invalid upon execution if the incorporated affidavit does not accompany the search." *Ibid.* Instead, "[w]hether a particularized warrant at the time of issuance may become an unparticularized warrant when a cross-referenced affidavit does not accompany the search remains a matter of continued debate among the

circuits and remains an issue that neither the text of the Fourth Amendment nor *Groh* resolves." *Ibid.*

b. Judge Gilman, joined by Judge Daughtrey, concurred in the judgment. Pet. App. 32a. While he believed that petitioner's Fourth Amendment rights had been violated, he agreed that the agents were entitled to qualified immunity because they did not violate clearly established law. *Ibid.*

c. Judge Clay, joined by three other judges, dissented. Pet. App. 33a-62a. He first concluded that the ATF agents' conduct violated the Fourth Amendment. *Id.* at 35a-48a. According to Judge Clay, *Groh* "makes it inescapably clear that a warrant cannot satisfy the particularity clause of the Fourth Amendment by reference to an affidavit that is not present at the scene of the search." *Id.* at 37a. He explained that, "[w]ithout seeing a copy of the affidavit, the individual whose property is being searched or seized has no way to know the limits of the officer's authority." *Id.* at 38a. Judge Clay noted that this Court had "expressly reserved the question of whether an officer's refusal to present a warrant to the individual being searched when the individual expressly requests to see the warrant is 'reasonable' within the meaning of the Fourth Amendment." *Id.* at 41a (citing *Groh*, 540 U.S. at 562 n.5). He added that "a search warrant's presence at the scene of the search does more than simply inform the individual of the officer's authority; it also informs the officers of the limits of their authority." *Id.* at 42a. Judge Clay suggested that the federal respondents "could have easily avoided this entire suit * * * simply by transcribing the items listed in the affidavit onto the warrant or onto a list attached to the warrant." *Id.* at 47a. "This Court," Judge Clay added, "would hardly be imposing any great burden on law en-

forcement officers by holding that [the federal respondents'] conduct violated the Fourth Amendment." *Id.* at 48a.

Judge Clay also concluded that the ATF agents were not entitled to qualified immunity. Pet. App. 48a-51a. He explained that, as in *Groh*, the agents "violated [petitioner's] Fourth Amendment right to be searched only pursuant to a warrant describing with particularity the items to be seized." *Id.* at 49a. The warrant was "deficient on its face," in Judge Clay's view, because it "utterly failed to describe any items that the officers intended to seize" but instead "referred the reader to an affidavit that the executing officer intentionally had placed under seal." *Ibid.* He reasoned that the agents' "reliance on this Circuit's pre-*Groh* case law is unavailing" because, "[i]nasmuch as the *Groh* search occurred in 1997, it follows that *Groh* applies to all searches occurring after 1997," and "[t]he search in this case occurred in 2001." *Id.* at 50a-51a.[2]

ARGUMENT

Petitioner contends (Pet. 7-27) that, by holding both that the ATF agents' conduct did not violate the Fourth Amendment and that, even if it did, the agents were entitled to qualified immunity, the court of appeals' decision conflicts with this Court's decision in *Groh* v. *Ramirez*, 540 U.S. 551 (2004). The court of appeals' decision was correct, and further review is not warranted at this time.

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[2] Judge Clay would have held that petitioner's *Bivens* action was barred under *Heck*, except insofar as it sought compensatory damages for his injured reputation and mental anguish (and punitive damages). Pet. App. 51a-62a.

1. Petitioner first contends (Pet. 7-22) that this Court should grant review to determine whether, consistent with the Fourth Amendment, officers may conduct a warrant search in accordance with a description of the items to be seized that was included in an affidavit reviewed by the magistrate and expressly incorporated in the warrant, when the affidavit did not accompany the warrant at the time of the search. That contention lacks merit.

a. The court of appeals correctly held that, under the circumstances of this case, such a search does not violate the Fourth Amendment. The Warrant Clause of the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The warrant in this case was validly "issue[d]" under the Warrant Clause because it expressly incorporated an affidavit that particularly described the items to be seized, thereby ensuring that "the magistrate understood and cabined the scope of the search he was authorizing." Pet. App. 11a.

The fact that the affidavit did not accompany the warrant *after* the warrant was issued did not retroactively render the issuance of the warrant invalid for purposes of the Warrant Clause. Nor did that fact render the search otherwise "unreasonable" under the Fourth Amendment, at least where, as here, the officers were evidently aware of the items that they had authority to search for and seize. Pet. App. 23a. Although the Fourth Amendment does not require an officer to present a property owner with a copy of the search warrant before conducting a search, see *United States* v. *Grubbs*, 126 S. Ct. 1494, 1501 (2006), the agents in this case did

present a copy of the warrant to the manager of the property and orally informed him of the items to be seized, thereby assuring the manager that a magistrate had passed on the existence of probable cause and enabling the manager to monitor the search. Pet. App. 22a-23a. Under those circumstances, the agents' conduct was reasonable and thus did not violate the Fourth Amendment.

b. Petitioner contends that, by upholding the constitutionality of the agents' conduct, the court of appeals' decision conflicts with this Court's decision in *Groh*. As petitioner concedes (Pet. 15), however, "the specific problem in *Groh* was not present in the case at bar." In *Groh*, the warrant at issue erroneously listed the place to be searched as the items to be seized. 540 U.S. at 554. Although the warrant application did list with particularity the items to be seized, the warrant itself in *Groh*—unlike the warrant in this case—did not expressly incorporate that document. *Id.* at 554-555. The Court held that the warrant was "plainly invalid." *Id.* at 557. The Court reasoned that the warrant "failed altogether" the Warrant Clause's requirement that it describe with particularity the things to be seized, and explained that "[t]he fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity." *Ibid.*

As petitioner notes (Pet. 9), the Court in *Groh* did assert that "most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, *and* if the supporting document accompanies the warrant." 540 U.S. at 557-558 (emphasis added) (citing decisions from the First, Sixth, Eighth, Ninth, Tenth, and District of Columbia

Circuits). Petitioner contends that, by citing those cases, the Court "tacitly" or "apparent[ly]" held that they were correct. See, *e.g.*, Pet. 11, 12, 14, 15. Immediately after citing those cases, however, the Court noted that "in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been placed under seal) accompany the warrant." 540 U.S. at 558. For that reason, the Court concluded, "we need not further explore the matter of incorporation." *Ibid.*; see *id.* at 557 (noting that "[w]e do not say that the Fourth Amendment prohibits a warrant from cross-referencing other documents"). The Court therefore did not hold that those cases were correctly decided and, more to the point, did not decide the precise question presented by this case. As a result, the decision of the court of appeals in this case does not conflict with this Court's decision in *Groh*.

c. Petitioner does not contend that the Court should grant review on the ground that the court of appeals' decision in this case conflicts with the court of appeals decisions *cited* in *Groh*. To the extent that he did, however, such a contention would lack merit. As a preliminary matter, of the six courts of appeals whose decisions were cited in *Groh*, only two (the Ninth and Tenth Circuits) had unconditionally held that an affidavit may cure an otherwise deficient warrant only when the warrant specifically incorporates the affidavit *and* the affidavit accompanies the warrant during the search. See *United States* v. *McGrew*, 122 F.3d 847, 849-850 (9th Cir. 1997); *United States* v. *Williamson*, 1 F.3d 1134, 1136 n.1 (10th Cir. 1993). The remaining four courts of appeals had held (in decisions other than those cited in *Groh*) that an affidavit may cure an otherwise deficient warrant either if the warrant simply incorporates the

affidavit (and the executing officers were aware of the relevant contents of the affidavit), see *United States* v. *Dale*, 991 F.2d 819, 846-848 (D.C. Cir.), cert. denied, 510 U.S. 906 and 1030 (1993); *United States* v. *Bonner*, 808 F.2d 864, 866-867 (1st Cir. 1986), cert. denied, 481 U.S. 1006 (1987), or, at most, if the warrant incorporates the affidavit and the affidavit is "present" at the scene when the search is conducted (even if it does not physically "accompany" the copy of the warrant possessed by the executing officers), see *United States* v. *Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993); *United States* v. *Gahagan*, 865 F.2d 1490, 1497-1499 (6th Cir.), cert. denied, 492 U.S. 918 (1989).[3]

To be sure, the court of appeals' decision in this case appears to conflict with the pre-*Groh* decisions of at least the Ninth and Tenth Circuits as to whether an incorporated affidavit must accompany the warrant at the time of the search. That apparent conflict, however, does not warrant the Court's review at this time because it is unclear whether the courts of appeals that have required accompaniment as well as incorporation will continue to apply the same rule in the wake of the Court's decisions in *Groh* and *Grubbs*. Those decisions indicate, first, that the validity of a warrant for purposes of the Warrant Clause is evaluated at the time of the warrant's issuance, see *Groh*, 540 U.S. at 557, and second, that the Fourth Amendment does not require an officer to present a property owner with a copy of the search warrant

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[3] Although the district court disposed of this case on a motion to dismiss (and there was therefore no factual development beyond the allegations in the complaint), the government represented to the lower courts that a copy of the affidavit was in fact present at the scene (and thus available to agents) at the time of the search. See, *e.g.*, Federal Resps. C.A. Reh'g Br. 17-18 n.7.

before conducting a search, see *Grubbs*, 126 S. Ct. at 1501. Like the court of appeals in this case, the only other court of appeals to have addressed the issue after *Groh* and *Grubbs* has relied on those cases in rejecting the proposition that the Fourth Amendment requires that "an executing officer possess or exhibit the affidavit or any other document incorporated into the warrant at the time of the search *in order for the warrant to be valid.*" *United States* v. *Hurwitz*, 459 F.3d 463, 472 (4th Cir. 2006). Because the courts of appeals that have required accompaniment may decide to reconsider that requirement in light of *Groh* and *Grubbs*, it would be premature to grant certiorari on the issue now.

2. Even if the ATF agents' conduct violated the Fourth Amendment, they were entitled to qualified immunity. Petitioner contends (Pet. 22-27) that the court of appeals erred by holding that, in light of clearly established law, the agents' conduct was reasonable. That contention lacks merit and also does not warrant further review.

a. The court of appeals correctly held that the ATF agents were entitled to qualified immunity. In determining whether an officer is entitled to qualified immunity, a court is required to judge the reasonableness of the officer's conduct "against the backdrop of the law at the time of the conduct." *Brousseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam). At the time of the search in this case (April 21, 2001), the Sixth Circuit had held that an affidavit may cure an otherwise deficient warrant if the warrant incorporates the affidavit and the affidavit is "present" at the scene at the time of the search, see *Gahagan*, 865 F.2d at 1497-1499, and had further suggested that the warrant need only incorporate the affidavit, see, *e.g.*, *Frisby* v. *United States*, 79

F.3d 29, 32 (6th Cir. 1996); *United States* v. *Brown*, 49 F.3d 1162, 1169 (6th Cir.), cert. denied, 516 U.S. 942 (1995); cf. *United States* v. *Pritchett*, 40 Fed. Appx. 901, 907 (6th Cir.) (rejecting challenge to a warrant incorporating an affidavit that was under seal, in decision postdating conduct at issue here), cert. denied, 537 U.S. 1023 (2002). In addition, as noted above, other courts of appeals had unambiguously held that mere incorporation was sufficient. See, *e.g.*, *United States* v. *Jones*, 54 F.3d 1285, 1292 (7th Cir.), cert. denied, 516 U.S. 902 (1995); *Dale*, 991 F.2d at 846-848; *Bonner*, 808 F.2d at 866-867. The fact that courts had reached different conclusions in other cases does not deprive the agents of qualified immunity. As this Court has explained, "[i]f judges * * * disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).[4]

b. Petitioner contends that the court of appeals' decision conflicts with the Court's decision in *Groh* in this respect as well. Unlike the dissenting opinion below

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[4] In addition, numerous courts of appeals (including the Sixth Circuit in an earlier case) had held that, where a search was invalid because an affidavit did not accompany the warrant or was otherwise not present at the time of the search, the fruits of the search nevertheless should not be suppressed because the officers were acting in good faith. See, *e.g.*, *United States* v. *Blakeney*, 942 F.2d 1001, 1026 (6th Cir. 1991), cert. denied, 502 U.S. 1035 (1992); *United States* v. *Maxwell*, 920 F.2d 1028, 1034 (D.C. Cir. 1990); *United States* v. *Curry*, 911 F.2d 72, 77-78 (8th Cir. 1990), cert. denied, 498 U.S. 1094 (1991). Indeed, in petitioner's appeal from his criminal conviction, the Eighth Circuit seemingly reached the same result. 75 Fed. Appx. 566, 568 (2003). As this Court has explained, "the same standard of objective reasonableness that we appl[y] [under the good-faith exception] defines the qualified immunity accorded an officer." *Malley* v. *Briggs*, 475 U.S. 335, 344 (1986).

(Pet. App. 50a-51a), petitioner does not directly contend that *Groh* constitutes "clearly established law" for purposes of the qualified-immunity analysis—nor could he, because *Groh* was decided *after* the conduct at issue. See, *e.g.*, *Brousseau*, 543 U.S. at 200 n.4. Instead, petitioner contends only that the conduct at issue was *analogous* to the conduct in *Groh*, as to which, the Court held, the agent involved lacked qualified immunity. See 540 U.S. at 563-565. In *Groh*, however, the Court repeatedly made clear that the warrant at issue contained a "glaring deficiency," and that the ensuing search was therefore plainly unconstitutional, because the warrant erroneously listed the place to be searched as the items to be seized. *Id.* at 564; see, *e.g.*, *id.* at 557 (describing warrant as "plainly invalid").

In this case, by contrast, the warrant contained no such "glaring deficiency," because it expressly incorporated an affidavit listing with particularity the items to be seized—and, as the various decisions preceding the agents' conduct amply demonstrate, the ensuing search was far from plainly invalid. *Groh* therefore does not compel the conclusion, or even suggest, that the agents' conduct was unreasonable in light of clearly established law. Nor does the court of appeals' holding that the agents were entitled to qualified immunity present any question that independently warrants this Court's review.[5]

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[5] In the event that the Court grants review on the constitutional issue, it should also grant review on the issue whether the law was clearly established at the time of the alleged violation, consistent with the Court's usual practice in *Bivens* cases and cases under 42 U.S.C. 1983. See, *e.g.*, *Wilkie* v. *Robbins*, cert. granted, No. 06-219 (Dec. 1, 2006); *Scott* v. *Harris*, cert. granted, No. 05-1631 (Oct. 27, 2006); *Devenpeck* v. *Alford*, 543 U.S. 146 (2001); *Groh*, *supra*; *Wilson*, *supra*.

3. Finally, even if the agents were not entitled to qualified immunity on petitioner's Fourth Amendment claim, the court of appeals' decision could be affirmed on the alternative ground that petitioner's *Bivens* action constituted a collateral attack on his criminal conviction and was therefore barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994). Even the dissenting opinion below recognized that, at a minimum, *Heck* foreclosed a substantial portion of petitioner's action. See Pet. App. 51a-62a. The availability of that alternative ground for affirmance provides an additional reason to deny review on the questions presented.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2007

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[6] Notably, after the Eighth Circuit affirmed petitioner's criminal conviction, petitioner filed a petition for a writ of certiorari in this Court, in which he contended that, insofar as the Eighth Circuit's upheld the district court's denial of his suppression motion, it "directly conflict[ed]" with the Court's decision in *Groh*. Pet. at 9, *Baranski* v. *United States*, No. 03-1351. The Court denied the petition. See 541 U.S. 1011 (2004).

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FILED
MAR 9 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-612

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Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

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ARGUMENT

1) The Government argues that the "fact that the affidavit did not accompany the warrant *after* the warrant was issued did not retroactively render the issuance of the warrant invalid for purposes of the Warrant Clause." Brief For The Federal Respondents In Opposition (hereinafter "Brief") at 11.

The "manifest purpose" of the Particularity Clause is to "prevent general searches"; limiting the authorization to search to specific areas and things "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison,* 480 U.S. 79, 84 (1987). The Court earlier explained that:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, at 196 [(1927)].

Stanford v. Texas, 379 U.S. 476, 485-486 (1965).

If the particularity of a warrant is measured only when the warrant is issued, not when it is executed -- when the need for particularity is at its zenith -- the Particularity Clause is robbed of its content because it no longer serve its primary purpose: ensuring that "nothing is left to the discretion of the officer executing the warrant." *Marron*, 275 U.S. at 196.

Accordingly, while separating the affidavit from the warrant after the warrant is issued does not retroactively render the issuance of the warrant invalid, the fact that the affidavit does not accompany the warrant after the warrant was signed voids the warrant's compliance with the Particularity Clause since it is no longer the warrant issued by the magistrate and renders the warrant invalid prospectively.

Separating the affidavit from the warrant when compliance with the Particularity Clause is dependent upon the incorporation of the affidavit is tantamount to the executing officer rewriting the description of the things to be seized. Because a warrant must be "authorized by a neutral and detached judicial officer," *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979), and may thus not be rewritten by the executing officer, an affidavit which ensures a warrant's compliance with the Particularity Clause may not be separated from the warrant without the warrant becoming one which was not authorized by a neutral and detached judicial officer.

2) The Government contends that the "fact that the affidavit did not accompany the warrant *after* the warrant was issued" did not "render the search otherwise 'unreasonable' under the Fourth Amendment, at least where, as here, the officers were evidently aware of the items that they had authority to search for and seize. Pet. App. 23a." Brief at 11.[1]

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[1] At the page of the Appendix to the Petition noted by the Government, the court of appeals stated that "the record shows" that "the day before the search, agent Johnson met with the other agents and laid out a plan for executing the warrant, which included a description of the guns to be seized, a map of the warehouse, [and] the specific location within the warehouse where the guns would be seized . . . ." Pet. App. 23a. As this

Whether the officers were "aware of the items that they had authority to search for and seize" is immaterial because the text of the Fourth Amendment "unambiguously" requires that a *warrant* state with particularity the things to be seized. *Groh* v. *Ramirez*, 540 U.S. 551, 557 (2004). Moreover, because the Fourth Amendment "by its terms requires particularity in the warrant, not in the supporting documents," 540 U.S. at 557, it is even more the case that the agent's knowledge of the things to be seized is not a substitute for a particularized warrant. Like unincorporated supporting documents which do not accompany the warrant, the agent's knowledge of the things to be seized does not advance any of the purposes for the Fourth Amendment's express mandate that the warrant itself describe the things to be seized.

In addition to ensuring that "nothing is left to the discretion of the officer executing the warrant," *Marron*, 275 U.S. at 196, particularity in the warrant provides "written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit." *Groh*, 540 U.S. at 560. Finally, particularity "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U.S. 1, 9 (1977). None of these purposes is advanced if the validity of a warrant is premised on the officer's knowledge.

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case was disposed of on a motion to dismiss the complaint, there was no record, other than the complaint, and there was nothing in the complaint concerning Agent Johnson's preparations for the search. It is thus unclear from what source the court of appeals reached this conclusion.

3) The Government asserts that, of the six courts of appeals whose decisions were cited in *Groh*:

> [F]our . . . had held (in decisions other than those cited in *Groh*) that an affidavit may cure an otherwise deficient warrant either if the warrant simply incorporates the affidavit (and the executing officers were aware of the relevant contents of the affidavit), see *United States* v. *Dale*, 991 F.2d 819, 846-848 (D.C. Cir.), cert. denied, 510 U.S. 906 and 1030 (1993); *United States* v. *Bonner*, 808 F.2d 864, 866-867 (1st Cir. 1986), cert. denied, 481 U.S. 1006 (1987), or, at most, if the warrant incorporates the affidavit and the affidavit is "present" at the scene when the search is conducted (even if it does not physically "accompany" the copy of the warrant possessed by the executing officers), see *United States* v. *Tagbering*, 985 F.2d 946,950 (8th Cir. 1993); *United States* v. *Gahagan*, 865 F.2d 1490, 1497-1499 (6th Cir.), cert. denied, 492 U.S. 918 (1989).

Brief at 13-14.

This statement is not entirely accurate. In *Dale, supra*, the D.C. Circuit concluded that the warrant "undoubtedly incorporated the limitations of the affidavit," but that "the record is not clear" whether the affidavit accompanied the warrant. 991 F.2d at 847. The court noted that the government stated that "'[i]n executing the warrant, the lead agent, Agent

Heidi Shintani, had the warrant and affidavit in her possession.'" *Id.* Further, the court observed that the defendants only argued that they "themselves did not see the affidavit at the search." 991 F.2d at 848. The court concluded that the evidence indicated:

> [A]t the very least, that Agent Shintani, who prepared the affidavit and obtained the warrant, was present at the search, oversaw the warrant's execution and guided the participating agents in seizing documents to conform the search to her understanding of the warrant's requirements.

Id.

Thus, the D.C. Circuit did not overrule *United States v. Maxwell*, 920 F.2d 1028, 1032 (D.C. Cir. 1990)(warrant must "not only attach the affidavit, but must also contain 'suitable words of reference'")(cited in *Groh* at 558).

In *Bonner*, *supra*, the issue before the First Circuit was whether the description of the premises in an attachment to the warrant was sufficiently particular because the street address was not included. The court held that the premises was "described with sufficient particularity, and although the address was inadvertently omitted, there was no reasonable probability that another premises might be mistakenly searched; thus, the search warrant was valid." 808 F.2d at 867. *Bonner* did not address the issue here -- which had previously been addressed in *United States v. Roche*, 614 F. 2d 6, 8 (1st Cir. 1980)("settled law" that, to rely on affidavit, it must be "incorporated into the warrant and served with the warrant") --

let alone hold that "that an affidavit may cure an otherwise deficient warrant either if the warrant simply incorporates the affidavit (and the executing officers were aware of the relevant contents of the affidavit) . . . ." Brief at 13-14.

With respect to the Eighth and Sixth Circuit cases referenced by the Government (*Tagbering* and *Gahagan*), while they held that the particularity requirement is met if the warrant incorporates an affidavit which is "present" at the scene when the search is conducted, this is consistent with the requirement of the previous cases in those circuits, see *United States* v. *Curry*, 911 F.2d 72 (8th Cir. 1991) and *United States* v. *Blakeney*, 942 F.2d 1001 (6th Cir. 1991), because the presence of the affidavit at the scene ensures that the purposes of the Particularity Clause are advanced, *i.e.*, leaving nothing to the discretion of the officer executing the warrant, assurance that the magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit, and assurance to the individual whose property is searched of the lawful authority of the executing officer, his need to search, and the limits of his power to search.[2]

4) The Government argues that the court of appeals' decision here only "appears to conflict with the pre-*Groh* decisions of at least the Ninth and Tenth Circuits as to whether an incorporated affidavit must accompany the warrant at the

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[2] The Government states that it "represented to the lower courts that a copy of the affidavit was in fact present at the scene (and thus available to agents) at the time of the search." Brief at 14, n.3. As the affidavit was under seal, unless the agents knowingly violated the sealing order, the affidavit could not have been at the scene.

time of the search" and that "apparent conflict . . . does not warrant the Court's review at this time" because "it is unclear whether the courts of appeals that have required accompaniment as well as incorporation will continue to apply the same rule in the wake of the Court's decisions in *Groh* and *Grubbs.*" Brief at 14. The court of appeals' decision here does not simply "appear" to conflict with pre-*Groh* decisions of the Ninth and Tenth Circuits; there is a direct conflict. Moreover, the court of appeals' decision here conflicts with pre-*Groh* decisions of the First Circuit (see *Roche*, *supra*); the Second Circuit (see *United States v. George*, 975 F.2d 72 (2nd Cir. 1992) and *United States v. Bianco*, 998 F.2d 1112 (2nd Cir. 1993));[3] the Third Circuit (see *Bartholomew v. Commonwealth of Pennsylvania*, 221 F.3d 425 (3rd Cir. 2000)),[4] and the Eighth Circuit (*Curry*, *supra*, and *Tagbering*, *supra*). Further, in light of *Groh*'s implicit approval of the decisions of six circuits, it is highly unlikely that those circuits would not continue to apply the same rule.[5]

The Fourth and Seventh Circuits are in accord with the

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[3] *George* held that "[r]esort to an affidavit to remedy a warrant's lack of particularity is only available when it is incorporated by reference in the warrant itself and attached to it." 975 F.2d at 76. *Bianco* approved a search warrant which referred to an affidavit which "was present at the time of the search . . . ." 998 F.2d 1116-1117.

[4] *Bartholomew* adopted the Ninth Circuit's decision in *United States* v. *McGrew*, 122 F.3d 847 (9th Cir. 1997). 221 F.3d at 428-430.

[5] Indeed, the First, Third, and Tenth Circuits have already made clear they will continue to apply the same rule. See *Rodriguez* v. *Beninato*, 469 F.3d 1 (1st Cir. 2006), *Doe v. Groody*, 361 F.3d 232 (3rd Cir. 2004), and *United States v. Riccardi*, 405 F.3d 852 (10th Cir. 2005).

Sixth Circuit in this case. In *United States* v. *Hurwitz*, 459 F.3d 463, 472 (4th Cir. 2006), the Fourth Circuit held that "it is sufficient *either* for the warrant to incorporate the supporting document by reference or for the supporting document to be attached to the warrant itself." 459 F.3d at 471. The court noted that "[a]t least one other circuit subscribes to this view. See *Baranski v. Fifteen Unknown ATF Agents*, 452 F.3d 433 (6th Cir. 2006)(en banc)." *Id.* In *United States* v. *Jones*, 54 F.3d 1285, 1290-92 (7th Cir. 1995), the Seventh Circuit held that an affidavit supplying the requisite particularity need to uphold a challenged warrant need not be physically appended to the warrant or explicitly incorporated by reference where the magistrate considered the affidavit in issuing the warrant and the officers complied with the affidavit when executing the warrant.

In light of this plain conflict, particularly the Fourth and Sixth Circuit's rejection of *Groh* (to the extent *Groh* approvingly cited decisions from the First, Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits, 540 U.S. at 557-558), the First, Third, and Tenth Circuits' reiteration of their positions following *Groh*, and in view of the split within the Sixth Circuit *en banc*, this case warrants this Court's review to resolve this issue of significance to law enforcement and the citizenry.

5) The Government argues that the court of appeals "correctly held that the ATF agents were entitled to qualified immunity" (Brief at 15) because a court is required to judge the reasonableness of their conduct "against the backdrop of the law at the time of the conduct." *Brousseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (*per curiam*). The law to which the

Government then refers is Sixth Circuit case law: *United States* v. *Gahagan*, 865 F.2d 1492 (6th Cir. 1989), *Frisby* v. *United States*, 79 F.3d 29 (6th Cir. 1996), and *United States* v. *Brown*, 49 F.3d 1162 (6th Cir. 1995), cert. denied, 516 U.S. 942 (1995). Circuit case law, however, is immaterial under *Groh*'s qualified immunity analysis.[6] Rather than look to Ninth Circuit case law, *Groh* looked to the Fourth Amendment's text and the Court's cases applying that text,[7] and held that the agents did not have qualified immunity as "the particularity requirement is set forth in the text of the Constitution, [and] no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid." 540 U.S. at 563. For the instant case, moreover, the Court's observation in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), is especially appropriate as to what a reasonable officer would have known:

> if the judge had crossed out the reference to controlled substances, written "see attached affidavit" on the form, *and attached the affidavit to the warrant*, the warrant would have been valid.

468 U.S. at 990, n.7 (emphasis added).

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[6] In any event, as the Petition explains (pages 24-27), Sixth Circuit case law makes clear that a reasonable officer would have known about the accompaniment requirement, depriving Respondents of qualified immunity.

[7] *Groh* noted (540 U.S. at 565) that *United States* v. *Leon*, 468 U.S. 897, 923 (1984) held that "a warrant may be so facially deficient--i.e., in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid."

6) The Government contends that, unlike the warrant in *Groh*, the warrant here did not contain a "glaring deficiency" because it "expressly incorporated an affidavit listing with particularity the items to be seized . . . ." Brief at 17. *Groh* held that the warrant was "glaringly deficient" because it "did not describe the items to be seized at all." 540 U.S. at 558. Thus, whether the things-to-be-seized portion of the warrant "does not describe the items to be seized at all" because it was blank or contained erroneous information or incorporated another document (where the other document was not present), the warrant is "obviously deficient . . . ." The deficiency here was equally "glaring" because the agents knew that the affidavit was sealed and that it was not attached to the warrant.

7) The Government contends that, even if the agents were not entitled to qualified immunity, the court of appeals' decision "could be affirmed on the alternative ground that petitioner's *Bivens* action constituted a collateral attack on his criminal conviction and was therefore barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994)." As the Government notes, however, *Heck* only forecloses a portion of Petitioner's action: "damages for [Petitioner's] injured reputation and mental anguish, as well as his request for punitive damages" are recoverable. Pet. App. 56a. Thus, *Heck* is not an alternative ground for affirmance and is not a reason to deny review.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

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March, 2007